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A

TREATISE

ON

MARINE, FIRE, LIFE, ACCIDENT

AND ALL OTHER

INSURANCES

INCLUDING MUTUAL BENEFIT SOCIETIES,

COVERING ALSO

GENERAL AVERAGE.

AND, SO FAR AS APPLICABLE,

RIGHTS, REMEDIES, PLEADING, PRACTICE AND EVIDENCE.

BY

JOSEPH A. JOYCE.

IN FOUR VOLUMES.

VOL. III.

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CHAPTER XLV.

WARRANTIES.

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§ **1942. Warranties—General Statement.**—In discussing warranties the rules relating strictly thereto are embodied in the following chapter, but the question of what constitutes a warranty and whether there has been a breach is closely connected with the questions of concealment, representations, and misrepresentations, and throughout the arguments of courts in numerous cases on any one of these subjects some of the principles underlying warranties are fully considered, so that the cases under the preceding chapters concerning concealment, representations, and misrepresentations may be advantageously consulted.

§ **1943. Division of Warranties.**—Warranties are express or implied; they are also affirmative and promissory. There may be several warranties and of each class in one policy.[1]

[1] See Stout v. City F. Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; O'Neil v. Buffalo F. Ins. Co., 3 N. Y. (3 Comst.) 122; Goicoechea v. Louisiana Ins. Co., 6 Mart. (La.), N. S., 51; 17 Am. Dec. 175; Deering's Annot. Civ. Code Cal., sec. 2603; Cady v. Imperial F. Ins. Co., 4 Cliff. (C. C.) 203, 209, per Clifford, J. Mr. Angell mentions affirmative and promissory warranties, but adds that the distinction between them "has been considered to be one of form rather than of substance; many warranties that are in form affirmative being in fact also promissory": Angell on Fire and Life Insurance, ed. 1855, 190-93, sec. 145. "When, however, there is any doubt as to whether the warranty is intended to refer only to the date of the policy, or to a continued state of facts, the doubt will be always resolved in favor of the insured. Promissory warranties must be as strictly performed as affirmative warranties": 1 Biddle on Insurance, ed. 1843, 566, 567. A distinction is made between affirmative and promissory warranties in Hammond on Fire Insurance, ed. 1840, 82, to this extent: "If it be

§ **1944. Express Warranty Defined.**—An express warranty is a particular stipulation inserted on the face of the policy or clearly embodied therein as a part thereof by proper words of reference, whereby the assured agrees that certain facts are or shall be true, or that certain acts have been or shall be done, and upon the literal truth or exact fulfillment of which stipulation concerning the same the validity of the contract depends, the stipulation will be effective, within the meaning of this definition, whether it be written on the margin or transversely, or on an attached or subjoined paper clearly referred to as a part of the contract. A warranty may relate to the past, present, or future, or each or all.[2]

§ **1945. Implied Warranty Defined.**—In marine policies there are certain stipulations which from the very nature of the contract are necessarily embodied therein as a part thereof, and which bind the assured with the same force as if actually expressed in the contract. These are called "implied warranties."[3] Thus, it is an implied warranty in every marine risk that the ship shall be seaworthy and competent to perform the voyage.[4] And if the property is described as belonging to

affirmative, it must be literally true; if promissory, it must be strictly performed. The breach of a warranty, therefore, consists either in the falsehood of an affirmative, or the nonperformance of an executory, stipulation."

[2] Stout v. City F. Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Lothian v. Henderson, 3 Bos. & P. 515, per Lawrence, J.; Pawson v. Watson, 1 Cowp. 785, per Lord Mansfield; Wood v. Hartford F. Ins. Co., 13 Conn. 533; 35 Am. Dec. 92; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Ripley v. Ætna F. Ins. Co., 30 N. Y. 136, per Muelin, J.; Duncan v. Sun F. Ins. Co., 6 Wend. (N. Y.) 488; 22 Am. Dec. 437; Robertson v. French, 4 East, 135, per Lord Ellenborough; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567; De Halin v. Hartley, 1 Term Rep. 346, per Lord Mansfield. "A warranty may relate to the past, the present, the future, or to any or all of these": Deering's Annot. Civ. Code Cal., sec. 2606. "A statement in a policy of a matter relating to a person or thing insured, or to the risk as a fact, is an express warranty thereof": Deering's Annot. Civ. Code Cal., sec. 2607.

[3] 1 Marshall on Insurance, ed. 1810, *347 a; McArthur on Marine Insurance, ed. 1890, 4, 13.

[4] Silva v. Low, 1 Johns. Cas. (N. Y.) 184; Warren v. United Ins. Co., 2 Johns. Cas. (N. Y.) 231; 1 Am. Dec. 164; Hoxie v. Home Ins. Co., 32

the subject of a neutral state, or is represented as neutral, this is equivalent to an express warranty of neutrality.[5] So if a vessel is described in the policy as an American ship, it is an implied warranty that she is American.[6] So also that goods will not be stowed in such an unusual manner as to expose them to extra danger.[7]

§ **1946. Affirmative Warranty Defined.**—An affirmative warranty is where the assured undertakes for the truth of some positive allegation; that is, he stipulates that certain facts are true.[8] A warranty may, however, be both affirmative and promissory; as in case of a warranty of neutrality.

§ **1947. Promissory Warranty Defined.**—Promissory warranties which are not infrequently called "executory," are those where the assured undertakes to perform some executory stipulation; as that certain acts shall or will be done, or that certain facts shall or will continue to exist.[9] As a general rule the courts hesitate to construe a warranty as promissory and continuing, and will refuse so to do if any other reasonable construction can be given.[10]

Conn. 21; 85 Am. Dec. 240; Dupeyre v. Western etc. Ins. Co., 2 Rob. (La.) 457; 38 Am. Dec. 218, except under time policies in England.

[5] Lothian v. Henderson, 3 Bos. & P. 499; Watton v. Bethune, 2 Brev. (S. C.) 453; 4 Am. Dec. 597.

[6] Goix v. Low, 2 Johns Cas. (N. Y.) 480. See Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404; Baring v. Clagget, 2 Bos. & P. 201; 5 East, 398; Murray v. United Ins. Co., 2 Johns. Cas. (N. Y.) 168; Lothian v. Henderson, 3 Bos. & P. 499; Lewis v. Thatcher, 15 Mass. 43; Vanderheuvel v. United Ins. Co., 2 Johns. Cas. 127, 451; but see Mackie v. Pleasants, 2 Binn. 363, noted sec. 1956, herein; Le Mesurier v. Vaughan, 6 East, 382; Clapham v. Cologan, 3 Camp. 382.

[7] Leutch v. American Ins. Co., 66 N. Y. 100.

[8] O'Neil v. Buffalo F. Ins. Co., 3 N. Y. 122; Stout v. City F. Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Baker v. German F. Ins. Co., 124 Ind. 490; 24 N. E. Rep. 1041; Dilleber v. Home L. Ins. Co., 69 N. Y. 256; 25 Am. Rep. 182; Marshall on Insurance, ed. 1810, *346.

[9] O'Neil v. Buffalo F. Ins. Co., 3 N. Y. (3 Comst.) 122; Smith v. Delaware Ins. Co., 3 Wash. (C. C.) 127; Cleveland v. Union Ins. Co., 8 Mass. 308; Stout v. City F. Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; 1 Marshall on Insurance, ed. 1810, *346.

[10] Virginia F. & M. Ins. Co. v. Buck, 88 Va. 517; 13 S. E. Rep. 973.

Oral statement not continuing warranty.—"I have seen no case which holds that an oral statement of fact could be construed into a con-

§ 1948. Warranty of Intention—The Case of Bilbrough v. Metropolitan Insurance Company.—In this case the property insured was located in a certain cotton-mill, and the assured, in answer to an inquiry, stated, "We only intend" to run the factory nights "until we get more cards which are making; shall not run nights over four months." In the sentence preceding, and which was a part of the same answer, he said: "We run the cards, picker, drawing-frames, and speeder day and night; the rest twelve hours daily." This statement was strictly construed as a warranty that the mill would not be run nights over four months at the limit, and would cease so running if the cards should be obtained before the four months elapsed.[11] It will be observed that the statement used the words we "intend," and the question may fairly arise whether the court did not raise a warranty by construction, and whether the language did not clearly import an intention to do a certain thing, as distinguished from a positive statement that the act should be done. We have already stated the rule governing representations of intention merely as distinguished from a positive statement that an event shall or will take place,[12] and we are inclined to the opinion that the above case ought to come within the principles embodied in that rule and evidenced by the cases relied on as supporting it. In this connection we will note a rule of Mr. Duer's, which is substantially this: In certain cases, if the assured after declaring his intention to do a certain act should, at once

tinuing warranty or promise when the contract is in writing. Clark v. Manufacturers' Ins. Co., 2 Woodb. & M. (C. C.) 472, 5 How. (U. S.) 235, merely decides that parol evidence might be introduced to identify the written application referred to in the policy. That covenants cannot be imported into or taken out of a written contract by parol is an elementary rule applicable to contracts for insurance as to others: See Abbott v. Shawmut M. F. Ins. Co., 3 Allen (Mass.), 213; Schmidt v. Peoria M. Ins. Co., 41 Ill. 295; Higginson v. Dall. 13 Mass. 96; Kimball v. Ætna Ins. Co., 9 Allen (Mass.), 540. The judgment in the case last cited reviews the authorities, and decides that an actual promise, if oral, cannot be given in evidence to defeat a policy which has once attached": Albion Lead Works v. Williamsburgh City F. Ins. Co., 2 Fed. Rep. 486, per Lowell, C. J.

[11] Bilbrough v. Metropolitan Ins. Co., 5 Duer, 587.

[12] Section 1904, herein.

the policy is effected, proceed contrary thereto to do other acts materially enhancing the risk, this would be evidence of an intent to deceive, which, if not rebutted by proof justifying such immediate change, would probably vitiate the contract; for the inference would reasonably exist that the declared intention never existed.[13] The Civil Code of California provides that "a statement in a policy which imports that it is intended to do or not to do a thing which materially affects the risk is a warranty that such act or omission shall take place."[14] The effect of this provision is to aid the assurer, since upon proof that a statement of intention is material to the risk a warranty would be created, but only a qualified warranty, qualified by its materiality, and not an absolute warranty in the first instance, differing herein from a warranty as generally known and understood outside of this enactment.

§ **1949. Form of Warranty—Construction.**—The form of words used is not important. The language of a written instrument will generally be assumed by the courts to import that meaning and to have that effect determined by judicial decisions, reference being had to the nature and requirements of the contract, the subject matter, and the whole instrument, and while warranties are not favored by construction, yet if the words by sound rules of interpretation clearly evidence a warranty, it will be so construed; nor are the words "warranty" or "warranted" essential.[15] So representations are not regarded as warranties unless inserted in the policy,[16] and

[13] 2 Duer on Marine Insurance, ed. 1845, 708.

[14] Deering's Annot. Civ. Code Cal., sec. 2608.

[15] Lyons v. Providence-Washington Ins. Co., 14 R. I. 110; Kenyon v. Berthan, Doug. 12. The particular word "warranty" need not necessarily be used, since a policy might be so framed as to impose upon assured all the obligations of a warranty, yet if the word is not used, it will not be without significance in determining whether there is or is not a warranty in any particular case: Mouler v. American L. Ins. Co., 111 U. S. 342, 343, per Harlan, J.; cited in Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405, 1418, per Watkins, J.

[16] Kentucky Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634; Williams v. New England Ins. Co., 31 Me. 219.

herein lies the distinction between a warranty and a representation; for the former precedes the contract as a part of the preliminary proceedings and is never in terms inserted in the policy, while the latter is a part of the completed contract.[17] In determining whether a statement in a policy of insurance is a warranty on the part of the assured, the entire policy must be considered, and if from the whole it appears that such statement was not intended as a warranty, it will not be so construed.[18] And where a circumstance is sought to be included by implication in the warranty, it never can be supposed that the parties intended to include it, unless it be manifestly material to the risk.[19] And in construing warranties not only is the intention of the parties essential, but reference must be had to the condition of the subject insured, the situation of the parties, and what was said and done at the time of effecting the policy, so far as such evidence is admissible.[20] A warranty that a ship shall not load more than her "registered tonnage" will be construed to mean the vessel's carrying capacity set forth in the ship's papers under which she was sailing at the date of the policy. Such carrying capacity cannot be determined by the law of measurement existing under the acts of Congress where the ship sails under a foreign registry, nor can such carrying capacity be ascertained by a law of the foreign country enacted after the ship was lost.[21] An express warranty cannot, as a general rule, be qualified by a representation, since by embodying the warranty in the contract

[17] Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 30; Dewees v. Manhattan Ins. Co., 34 N. Y. 244; Goram v. Sweeting, 2 Saund. 200 b., n.; Pawson v. Barnwelt, Doug. 12, n. And see last chapter herein; Dilleber v. Home L. Ins. Co., 69 N. Y. 256; Travelers' Ins. Co. v. McConkey, 127 U. S. 666, and cases cited; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567; Mouler v. American Ins. Co., 111 U. S. 341; Grace v. American Ins. Co., 109 U. S. 282; United Ins. Co. v. Kimberly, 34 Md. 224.

[18] National Bank v. Union Ins. Co., 88 Cal. 497; 22 Am. St. Rep. 324.

[19] O'Neil v. Buffalo F. Ins. Co., 3 N. Y. (3 Comst.) 122.

[20] Hoose v. Prescott Ins. Co. (Mich.), 47 N. W. Rep. 587; 32 Cent. L. J. 226; 11 L. R. Annot. 340.

[21] Reck v. Phœnix Ins. Co., 130 N. Y. 160; 29 N. E. Rep. 137; 43 Alb. L. J. 155; 41 N. Y. St. Rep. 250.

it will supersede the representation,[22] although an implied warranty or condition not expressed in the policy may be qualified or superseded by a verbal or written representation.[23] In construing a warranty the language used must be governed by mercantile usage; that is, it must be construed with reference to the usage of trade, the commercial sense, according to the general understanding of merchants, superseding the ordinary meaning of the terms employed.[24] And we would add that in determining whether a warranty arises from the terms of the policy or by reference to other documents those certain cardinal rules of construction which should be resorted to and strictly applied are briefly these: 1. The court will carefully examine every part of the contract to discover the intention of the parties, which when ascertained will govern; 2. Reference must be had to the nature and requirements of the risk and the subject matter; 3. The construction must be reasonable; 4. The contract must be upheld if possible, for forfeitures are not favored; 5. Warranties are not favored by construction; 6. Courts will not create, extend, or enlarge by construction; 7. Construction should be strictly against the assurer and liberally in favor of the assured; 8. The written controls the printed part of the policy; 9. Words are to be construed in their ordinary and popular sense, subject to such exceptions as arise in case of usage—technical, etc., words.[25]

§ 1950. In cases of Doubt Construction against Warranty—Intention of Parties.—If there is any doubt whether a statement is an express warranty, the court should lean against that construction which imposes a warranty on assur-

[22] Vandervoort v. Smith, 2 Caines (N. Y.) 155; Redmond v. London, 3 Camp. 503; Atherton v. Brown, 14 Mass. 152; Deering's Annot. Civ. Code Cal., sec. 2575.

[23] Parks v. General Int. Ins. Co., 5 Pick. (Mass.) 37, per Wilde, J.; Walden v. Fire Ins. Co., 12 Johns. (N. Y.) 136, per Platt, J.; Deering's Annot. Civ. Code Cal., sec. 2575.

[24] Lethullier's case, Salk. 443; Gordon v. Morley, 2 Strange, 1264; Urquhart v. Barnard, 1 Taunt. 450. "A warranty, like every other part of the contract, is to be construed according to the understanding of merchants, and does not bind the assured beyond the commercial import of the words": 1 Marshall on Insurance, ed. 1810, *347 a.

[25] See chaps. viii and ix, herein.

ed.[26] So also if an insurance policy contains contradictory terms, or is so framed as to leave room for construction rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, it should be construed so as not to impose an obligation of a warranty upon the assured.[27] Although under the Civil Code of California a statement in a policy of a matter relating to a person or thing insured, or to the risk as a fact, is an express warranty, yet if taking the entire policy in all its terms and language it can be seen that such was not the intention of the parties, the statement of fact will not be deemed an express warranty.[28]

§ **1951. Warranty in Effect Condition Precedent.**—A warranty, whether express or implied, affirmative or promissory, is in effect a condition precedent to a recovery, the terms of which must be strictly fulfilled by the assured, for upon its nonperformance the contract is avoided.[29]

§ **1952. Same Subject—Loss Occurring Prior to Breach of Promissory Warranty.**—Some question has arisen upon the point whether the insurer is exonerated merely from the time a breach of a promissory warranty occurs or whether such breach avoids the contract ab initio. Mr. Marshall, Mr. Arnould, and Mr. Maclachlan are all of the opinion that an executory warranty is a condition precedent, and that its subse-

[26] National Bank etc. v. Union Ins. Co., 88 Cal. 497.

[27] Noone v. Transatlantic F. Ins. Co., 88 Cal. 152.

[28] National Bank etc. v. Union Ins. Co., 88 Cal. 497; Deering's Annot. Civ. Code Cal., sec. 2607.

[29] Farmers' Ins. Co. v. Snyder, 16 Wend. (N. Y.) 481; 30 Am. Dec. 118; Pierce v. Empire Ins. Co., 62 Barb. (N. Y.) 636; Goicoechea v. Louisiana Ins. Co., 6 Mart. (La.), N. S., 51; 17 Am. Dec. 175; De Hahn v. Hartley, 1 Term Rep. 345, 346, per Lord Mansfield; Duncan v. Sun F. Ins. Co., 6 Wend. (N. Y.) 488; 22 Am. Dec. 53; Baker v. German F. Ins. Co., 124 Ind. 490; 24 N. E. Rep. 1041; McLoon v. Commercial M. I. Co., 100 Mass. 472; 97 Am. Dec. 116; 1 Am. Rep. 129; Hibbert v. Pigou, reported in 1 Marshall on Insurance, ed. 1810, *369, *370 a, per Lord Mansfield; Allen v. German American Ins. Co., 123 N. Y. 6; 25 N. E. Rep. 309; Fowler v. Ætna Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 73; O'Neil v. Buffalo F. Ins. Co., 3 N. Y. (3 Comst.) 122.

quent breach avoids the policy ab initio, the substance of the argument being that the very basis of the contract rests upon the agreement to observe strictly and literally, and at all events, the conditions imposed; that the warranty makes the contract hypothetical, binding only if the warranty is complied with, and that the only question is, Has the event taken place or not? If it has not, then there is no contract, and that nothing will excuse compliance with an express warranty, unless possibly in cases where the state of things contemplated by the warranty shall cease or a subsequent law makes compliance illegal.[30]

[30] 1 Marshall on Insurance, ed. 1810, *348, *349; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 586, *583; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 604. The only authority for the proposition rests upon the declarations of that eminent and learned jurist, Lord Mansfield, on two occasions, who says: "There are hypothetical contracts and conditional contracts. In the former, the contract depends on an event taking place. There is no latitude, no equity; the only question is, Has that event happened?" And again, "The warranty is a contract of insurance, is a condition or a contingency, and, unless that be performed, there is no contract": Hibbert v. Pigou, reported in 1 Marshall on Insurance, ed. 1810, *369, *370 a; De Hahn v. Hartley, 1 Term Rep. 345, 346. The language used must, however, be construed with reference to the facts of the case and in neither of these cases from which the language is taken did the loss occur until after the breach of the warranty. That Lord Mansfield did not intend by the language used to establish the rule above claimed is evident from other decisions made by him. Thus, in another case, where there was a warranty to have sailed on or before a certain day, he says: "The question then is, Had she or had she not sailed on or before the day? No matter what prevented her, if she had not sailed, ... the policy would have been void, ... there would have been no contract between the parties, ... there would have been an end of the policy": Bond v. Nutt, Cowp. 601, per Lord Mansfield. "The act 38 Geo. III, c. 76, sec. 1, provides that in case of sailing without convoy, the insurance on the ship shall be void, and the premium not returnable. This certainly would not be sufficient in itself to show that Lord Mansfield only considered the contract at an end from the time of the breach only, but, in connection with the following cases, it is clearly evident that he did not consider the contract void ab initio for a breach of an executory warranty. Thus, in Stevenson v. Snow, the ship was insured "at and from London to Halifax, warranted to depart with convoy from Portsmouth for the voyage." Before the ship reached Portsmouth, the convoy had gone, but a proportionate return of the premium was granted, and Lord Mansfield placed this decision upon the fact that where there was a contingency in the

§ 1954. Same Subject—Additional Authorities.—In Barnes v. Holland,[31] the policy was "at and from" New York to Quebec, warranted to sail on or before November 1st. On

voyage, the risk might be divided; that is, that the fact of not sailing with convoy from Portsmouth reduced the contract in fact to a voyage from London to Portsmouth, for which the risk had been run: Stevenson v. Snow, 3 Burr. 1237; 1 W. Black. 318, per Lord Mansfield. And if more were needed to show what this eminent jurist meant by the language relied on by the text-writers above noted, he refers in a subsequent decision to the case last noted herein, and says: "In that case, the intention of the parties, the nature of the contract, the consequences of it, spoke manifestly of the insurances, and a division between them. The first object of the insurance was from London to Halifax. But if the ship did not depart from Portsmouth with the convoy specified, then there was to be no contract from Portsmouth to Halifax. The parties then have said: 'We make a contract from London to Halifax; but on a certain contingency it shall only be a contract from London to Portsmouth.' That contingency not happening reduces it, in fact, to a contract from London to Portsmouth only. The whole argument turned upon that distinction, and all the judges, in delivering their opinions, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages; . . . . a case of general practice was put by Mr. Dunning, where the words of the policy are 'at and from, provided the ship sails on or before the first day of August,' and Mr. Wallace considers in that case that the whole policy would depend upon the ship's sailing before the stated day. I do not think so. On the contrary, I think with Mr. Dunning that cannot be. A loss in port before the day appointed for the ship's departure can never be coupled with a contingency after the day. But if a question were to arise about it, as at present advised, I should incline to be of opinion that it would fall within the reasoning of Stevenson v. Snow, above noted, and that there were two parts or contracts of insurance with distinct conditions: The first is, 'I insure the ship in port against loss before the 1st of August,' and secondly, 'If she should not be lost in port, I insure her then, during her voyage from the 1st of August till she reach the port specified in the policy. The loss in port must happen before the risk upon the voyage could commence, and, vice versa, the risk in port must cease the moment the risk upon the voyage began": Tyrie v. Fletcher, Cowp. 666, per Lord Mansfield. See Taylor v. Lowell, 3 Mass. 33, per Parsons, Ch. J. and Sewall, J. In another case, where the warranty was to depart with convoy, on or before a certain date, the warranty not being fulfilled, the underwriters were discharged from the remaining risk, but no return of premium was allowed for the risk run up to the time of breach: Long v. Allen, 4 Doug. 276. So, also, in Gale v. Mackill, reported in 1 Marshall on Insurance, ed. 1810, 659, and see Meyer v.

[31] 10 Exch. 801; 32 Eng. L. & Eq. 503.

that day she was at sea safely proceeding to Quebec, and consequently did not arrive in time to sail as warranted, and she was thereafter lost. The time of the year was not such as to enable her to fulfill her warranty, and it was held that the policy must be so construed as to effect the evident intention of the parties, and that the warranty meant that she was to sail for Quebec on or before November 1st, if she arrived there by that time, otherwise there would be no insurance on the vessel between New York and Quebec, and that the underwriters were liable for a loss after November 1st and before she reached Quebec, on the ground that the warranty only related to the voyage following her arrival at Quebec. It is true that prima facie proof is required of compliance with the express warranties of a policy,[31a] but there is nothing in this requirement to conflict with the view above taken. In a New York case an insurance was effected "at and from," with a warranty to sail between specified dates. The ship did not sail until the time had passed, and it was held that the warranty related to the voyage and not to the risk in port, and therefore the risk attached on the vessel in port, and there could be no return of premium.[32] Mr. Phillips argues from the fact that the premium was not returned in this case, that there must have been a valid subsisting contract at some time, and that a recovery could be had for a loss occurring prior to the breach of a warranty which relates to a circumstance necessarily subsequent to the commencement of the risk,[33] and Mr. Parsons states substantially the same rule.[34] The code of California provides that a breach of warranty without fraud merely exonerates the insurer from the time it occurs.[35]

Gregson, reported in 1 Marshall on Insurance, 658. It is therefore evident that Lord Mansfield never intended that his language, relied upon as stated in the beginning of this section, should mean that where a warranty is executory, it must be held a condition precedent to recovery, avoiding the policy ab initio in case of its breach.

[31a] Arcangelo v. Thompson, 2 Camp. 620; Watson v. King, 4 Camp. 275. See secs. 3784, 3785, herein.

[32] Hendricks v. Commercial Ins. Co., 8 Johns. (N. Y.) 1.

[33] 1 Phillips on Insurance, 3d ed., 425, sec. 771.

[34] 1 Parsons on Marine Insurance, ed. 1868, 341

[35] Deering's Annot. Civ. Code Cal., sec. 2612.

§ 1955. Same Subject—Conclusion.—We conclude that the weight of authority is that a warranty that a given thing shall take place subsequently to the commencement of the risk is not a condition precedent to the recovery of a loss occurring prior to the time fixed for the performance of the warranty and during the existence of a risk which has commenced, and is so far valid up to the time of the loss that the insurer is entitled to retain the premium paid therefor,[36] and this rule precludes the idea that a subsequent breach of such a promissory warranty relates back prior to the antecedent loss, and renders the policy void ab initio. Fraud, however, would necessarily constitute an exception to the rule.

§ 1956. Express Warranty must Appear on Face of Policy or be Made a Part of Contract.—It is a well-settled rule that an express warranty must appear upon the face of the policy, or be clearly incorporated therein and made a part thereof by explicit reference or by words clearly evidencing such intention.[37] So it is declared in a recent New York case

[36] See sec. 1973, herein.

[37] Kentucky etc. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634; Pettigrew v. Pringle, 3 Barn. & Adol. 314; Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; Wood v. Worsely, 2 H. Black. 574; Stebbins v. Globe Ins. Co., 2 Hall (N. Y.), 632; Clapp v. Massachusetts Mut. B. Assn., 146 Mass. 519; Goddard v. East Texas F. Ins. Co., 67 Tex. 69; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593; Pawson v. Watson, Cowp. 785, per Lord Mansfield; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Dewees v. Manhattan Ins. Co., 34 N. J. 224; Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Cornfoote v. Fowke, 6 Mees. & W. 378, per Lord Abinger; Vose v. Eagle etc. Ins.Co., 6 Cush. (Mass.) 42; Hartford Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Macdowell v. Frazer, Doug. 260; Mutual B. L. Ins. Co. v. Miller, 39 Ind. 475; Williams v. New England etc. Ins. Co., 31 Me. 219. "It is immaterial whether an express warranty is inserted in the body, margin, or at the foot, but it must appear somewhere upon the face of the policy": McArthur on Marine Insurance, ed. 1890, 5. "An express warranty being in the nature of a condition precedent, it must appear on the face of the policy; therefore, instructions in writing for effecting the policy, unless inserted in the instrument itself, do not amount to a warranty: Pawson v. Barnwelt, Doug. 12, n.; but only to a representation upon which the doctrine differs": Hammond on Fire Insurance, ed. 1840, 82, 85. "Warranties are not necessary in fire policies, inasmuch as

that no statement made to an insurance company as the basis of a contract of insurance can be regarded as a warranty, unless the paper in which it is made is by necessary inference made a part of the contract, and if a paper not made a part of the policy by anything in the policy itself contains certain statements, they cannot by construction be enlarged and made warranties so that the insurer may insist upon a forfeiture.[38] And the rule is that a warranty must be strictly construed; it cannot be created or extended by construction, nor can it include by construction anything not necessarily implied in its terms,[39] and it must be clearly and unequivocally expressed that a warranty was intended, or it must result necessarily from the nature of the contract.[40] Thus, while a specified fact, quality, or circumstance may relate to the risk and so constitute a warranty, yet it may only be used to identify the subject of insurance or be used merely by way of recital and description, and not have the force and effect of a warranty.[41] As a general rule the greater part of the printed and written conditions

the representations, which must be true in all particulars material to the risk, are entirely adequate to protect the interests of the insurers. But it has become quite usual to convert representations into stipulations of warranty by some reference or condition in the policy. . . . . A representation inserted in the policy becomes a warranty, and a representation, when referred to in the policy as forming a part of it, has the same effect as though it was written in the body of it; that is, the representation becomes a warranty. But a mere reference to another paper as a survey or application does not make it a part of the policy, nor bind the insured by its contents as a warranty": Flanders on Fire Insurance, 2d ed., 232, 233. A warranty must appear upon the face of the policy, or be incorporated therein by apt and proper words of reference as a part thereof: Mouler v. American L. Ins. Co., 111 U. S. 342, 343, per Harlan, J.; cited in Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405, 1418, per Watkins, J.

[38] Boehm v. Commercial Alliance L. Ins. Co., 62 N. Y. St. Rep. 211 (N. Y. Supr. Ct. Spec. Term); affirmed without opinion, 86 Hun (N. Y.), 617.

[39] Taylor v. Northwestern Ins. Co., 2 Cent. 610; Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; Hyde v. Bruce, 3 Doug. 213; Howard F. & M. Ins. Co. v. Cormick, 24 Ill. 455; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 387.

[40] United States Insurance Co. v. Kimberly, 34 Md. 224; Alabama G. L. Ins. Co. v. Johnson, 80 Ala. 467; 2 S. Rep. 125; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567.

[41] Wood v. Hartford F. Ins. Co., 13 Conn. 533.

and stipulations in policies is in the nature of a warranty, and any statement or description, printed or written, on the face of the policy in fire or marine insurances which relates to the risk is substantially a warranty.[42] A Pennsylvania case is sometimes cited as holding that the fact that the statement appears on the face of the policy does not make it a warranty where it is clearly evident from the terms of the contract that such statement is of a fact which can have no possible relation to the risk, and that it could not have influenced the underwriter in assuming the risk. The case, however, cannot be held to support the broad principle which it seemingly warrants as thus stated, since it appeared in evidence that by the custom of Philadelphia special warranties were inserted in a special clause, and this claimed warranty of nationality was not set forth in the regular clause, and the court construed the whole contract together, and gave this fact great weight as evidencing the intent that such warranty was not contemplated by the parties, so that the case may in reality be held to sustain the principles that the courts will not create or extend a warranty by construction, and will so construe the entire contract as to ascertain and effectuate the intention of the parties, and in this view no legal objection can be had to the decision, and, at the most, that the statement was intended as a mere recital of a fact was evident from the contract.[43]

§ 1957. Warranties—Statements in Application.—Statements in an application, though declared to be warranties, will not be given effect as such if qualified by other stipulations which show that the parties did not so regard them.[44] So in

[42] Lothian v. Henderson, 3 Bos. & P. 515, per Lawrence, J.; Wall v. East River Ins. Co., 7 N. Y. (Seld.) 370; Miles v. Connecticut Mut. Ins. Co., 3 Gray (Mass.), 580; Kelsey v. Universal L. Ins. Co., 35 Conn. 225; Mead v. Northwestern Ins. Co., 7 N. Y. 530; Hopkins on Insurance, 174, 181, 182, 195. "Warranties in charter parties being homologous in nature with those contained in policies of insurance are quoted in cases arising on the latter for precedent: Hopkins on Insurance, 181."

[43] Mackie v. Pleasants, 2 Binn. 363.

[44] Wheaton v. North British etc. Ins. Co., 76 Cal. 415; 9 Am. St. Rep. 216.

Kansas, although an application may provide that all statements therein are warranted to be true, yet if the policy simply refers to the answers in the application as statements and not as warranties, it is held that courts will not construe them as warranties, but as statements, merely requiring of the insured that he shall exercise good faith and answer all questions truthfully so far as he is able so to do. And in case of any omission by the insured to state any facts which he may honestly deem immaterial, such omission will not avoid the policy.[45] Again, it is declared in a federal case that if the policy does not make the application a part thereof, or any of the statements in the application warranties, a recovery cannot be defeated unless such statements, or some of them, are found to be material and untrue.[46] But in a California case the plaintiffs held the goods of a corporation, in which they were stockholders, as security for advances to said corporation, and a fire policy was effected thereon in which the property was described by the plaintiffs as their own, and this was held to avoid the insurance under a provision in the policy making the statements in the application warranties, and stipulating that if assured was not the sole, absolute, and unconditional owner of the property, and such interest were not truly stated in the policy, it should be void; nor are the insurers in such case estopped to deny the invalidity of the policy for failure to assert it immediately after loss, when they discovered the true nature of plaintiffs' interest.[47]

§ 1958. Applications and Other Papers—What Constitutes a Sufficient Reference—Marginal Writings on Policy, etc.—In order to make the statements contained in the

[45] Northwestern M. L. Ins. Co. v. Woods, 54 Kan. 663; 39 Pac. Rep. 189. In a case in the appellate court of Missouri, it is held that if the statements in an application for insurance upon a house are made warranties, and the insured states therein that the house is situated upon a piece of land owned by him and of a certain number of acres in size, it is held that this statement will, if untrue, avoid the policy: Maddox v. Dwelling-House Ins. Co., 56 Mo. App. 343.

[46] Fidelity etc. Co. v. Alpert (U. S. C. C. A., 3d Cir. 1895), 67 Fed. Rep. 460.

[47] McCormick v. Springfield F. & M. Ins. Co., 66 Cal. 361; McCormick v. Orient Ins. Co., 86 Cal. 261, 263.

application or printed or written proposals and the like warranties, they should be so referred to as constituting a part of the contract as to clearly evidence an intention that the parties deemed them a part of the policy and warranties; that is, the words of reference should be clear and explicit. A general reference to the statement or paper containing the same is not sufficient.[48] Thus, a general reference to description of the insured property on file in the office of the insurers does not make it a part of the contract and a warranty,[49] nor do the words as "per application" constitute a sufficient reference,[50] and a written paper of instructions wrapped up in a policy does not become a warranty.[51] Statements contained in a paper annexed to the policy, but not referred to therein, are not warranties,[52] and the same is true of a paper wafered to the policy.[53] But an entry on the margin of or across the policy, or on a separate paper referred to in the policy and relating to the risk, is construed as a warranty.[54] And if the policy expressly refers to the application "as forming a part of the policy," [55] or the words used are "reference being had to the application of said J. for a more particular description, and the conditions annexed as forming a part of this policy," [56] or the words "the application and survey made by the assured is hereby made a part of this policy and a warranty," [57] or provides that the insurance is made "in consideration of the representations

[48] Miller v. Mutual etc. Ins. Co., 31 Iowa, 216; Goddard v. East Texas F. Ins. Co., 67 Tex. 69; 1 S. W. Rep. 906; Stebbins v. Globe Ins. Co., 2 Hall (N. Y.), 632; Campbell v. New England L. Ins. Co., 98 Mass. 381; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567; Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535; Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416.

[49] Stebbins v. Globe Ins. Co., 2 Hall (N. Y.), 632.

[50] Vilas v. New York Cent. Ins. Co., 72 N. Y. 590.

[51] Pawson v. Barnwelt, Doug. 12, n.

[52] Goddard v. East Texas F. Ins. Co., 67 Tex. 69; 1 S. W. Rep. 906.

[53] Bize v. Fletcher, Doug. 13.

[54] Wood v. Hartford Ins. Co., 13 Conn. 533; 35 Am. Dec. 92.

[55] Burritt v. Saratoga County Mut. Ins. Co., 5 Hill (N. Y.), 188.

[56] Jennings v. Chenango Mut. Ins. Co., 2 Denio (N. Y.), 75.

[57] State Ins. Co. v. Jordan, 24 Neb. 358; 38 N. W. Rep. 839; Thomas v. Fame Ins. Co., 108 Ill. 91; Tebbetts v. Hamilton etc. Ins. Co., 1 Allen (Mass.), 305; Pierce v. Empire Ins. Co., 62 Barb. (N. Y.) 636.

made in the application for the same, which is hereby made a part of the policy," and that the policy should be void "if the representations made in the application for this policy, and upon the faith of which this policy is issued," should be found in any respect untrue,[58] the statements made are warranties.[59] So there is a class of cases where a stipulation in the policy makes the answers contained in the application the basis of the contract, and further provides that the policy shall be avoided if the statements are found untrue, or cases where the policy contains some like agreement; it is held that such stipulations are warranties, especially where the statements relate to the situation or use of the property, or describe the same.[60] And the same is held in cases of like stipulations and agreements contained in the application,[61] unless other qualifying words are used.[62] Those statutes which require that the application or by-laws, or a copy thereof, shall be annexed to or contained in the policy, and which go to the admissibility of such application in evidence, are important to be noted in connection therewith.[63]

§ 1959. Reference to Application, Plan, Survey, etc., Continued.—As is apparent from the last section, a mere reference in the policy to a survey, application, or other paper does not ordinarily make it so far a part of the contract as to constitute the representations therein technical warranties, so as to bind the assured to the strict observance thereof required in case of warranties, although it is held to be otherwise where the application is referred to as "forming a part" of the policy, or where it refers to such survey and also makes it a part of the policy.[64] So answers to questions in an application for in-

[58] Higbee v. Guardian etc. L. Ins. Co., 66 Barb. (N. Y.) 462.

[59] See, also, Connecticut Mut. L. Ins. Co. v. Pyle, 44 Ohio St. 19.

[60] Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio (N. Y.), 75; Keelsey v. Universal etc. Ins. Co., 35 Conn. 225. See Studwell v. Mutual B. L. Assn. of America, 46 N. Y. St. Rep. 902; 19 N. Y. Supp. 709.

[61] Chrisman v. State Ins. Co., 16 Or. 283; 18 Pac. Rep. 466 (annotated case).

[62] Garcelon v. H. etc. Ins. Co., 50 Me. 580.

[63] See sec. 1916, herein.

[64] Burritt v. Saratoga Co. etc. Ins. Co., 5 Hill (N. Y.), 188; 40 Am. Dec. 345; First Nat. Bank of Ballston v. North America Ins. Co., 50

surance not required by the conditions of the policy are mere material representations, and not warranties; nor are they incorporated into the contract or made part of the conditions upon which it is founded by being contained in a paper called a "survey," to which the policy refers in words, "For a more particular description of said premises, see survey No. 74, furnished by the insured, which is hereby made a part of this policy," nor by a condition in the policy that a survey and description shall be deemed a part of the policy and warranty on the part of the assured.[65] And where the application and survey furnished by the assured himself stated that thick stone partitions ran lengthwise through the building to the roof, and the statements in the application were not warranted, it was held that the fact that the stone partition ran no higher than the garret floor did not avoid the policy, unless the fact that it did not run to the roof increased the risk in the opinion of the jury.[66] If the policy refers to the survey and makes it a warranty in terms, then it is so.[67] The fact that the statement is promissory, rather than affirmative, does not alter the rights and duties of the parties; for if the promise is not kept the insurer is not bound by the policy.[68] So if the policy provides that all the statements contained in the application "shall be taken to be warranties," they are so.[69] If the assured is required to apply to the company's agent or make the survey himself strictly according to certain requirements, and the agent makes the survey upon application of the assured, the

N. Y. 45; Farmers' Ins. Co. v. Snyder, 16 Wend. (N. Y.) 481; 30 Am. Dec. 118; affirming 13 Wend. (N. Y.) 92; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383.

[65] Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684. See Buell v. Connecticut Mut. L. Ins. Co., 2 Flip. (C. C.) 9; 5 Ins. L. J. 274.

[66] Farmers' Ins. & Loan Soc. v. Snyder, 16 Wend. (N. Y.) 481; 30 Am. Dec. 118; affirming 13 Wend. (N. Y.) 92.

[67] Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Ripley v. Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362.

[68] Ripley v. Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362.

[69] Bennett v. Agricultural Ins. Co., 50 Conn. 420.

latter is not bound by its accuracy.[70] If the application and survey are referred to and made a part of the policy and warranty by the assured, the fact that they were not furnished until after the delivery of the policy and were written on blanks of another company defeats the obligations of the contract.[71]

§ **1960. Same Subject—Cautionary Suggestions.**—It is evident that there are many arbitrary decisions upholding warranties which are far from being justified by the rules of law relating to the constructions of policies. Such decisions ought not to be relied on as precedents of weight. The strictness which prevailed in the earlier cases of marine insurance has been applied by many judges, notwithstanding the constantly growing tendency of courts toward a more liberal construction than formerly obtained, and also to require that only the clearest and most unequivocal language will create a warranty. It is not every reference to the statements in an application as constituting part of the policy which thereby makes them a warranty. It may be referred to as a part of the policy merely to fix a standard of comparison, or merely to identify the description and condition of the property at the time, and not for the purpose of creating or evidencing a covenant or warranty on the part of the assured.[72] So in a case in the supreme court of the United States the court says: "In the contract before us the answers in the application are nowhere called warranties or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as 'the declarations or statements upon the faith of which this policy is issued,' and in the concluding paragraph of the application the answers are declared to be 'fair and true an-

[70] Patten v. Merchants' etc. Ins. Co., 40 N. H. 375; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452. See Nicoll v. American Ins. Co., 3 Woodb. & M. 529.

[71] Rankin v. Amazon Ins. Co., 89 Cal. 203; 25 Pac. Rep. 260. See Albion Lead Works v. Williamsburg etc. Ins. Co., 2 Fed. Rep. 479, 483, 484, for a full consideration of what constitutes a "survey" and when it is a warranty.

[72] Kentucky etc. Mut. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634, per Marshall, C. J.

swers to the foregoing questions,' and to 'form the basis of the contract for insurance.' They must, therefore, be considered, not as warranties which are part of the contract, but as representations collateral to the contract and on which it is based." [73] The cases may be multiplied which illustrate the tendency of the courts to exclude warranties where from the whole contract construed together a doubt is raised whether a warranty was intended. If a warranty was not intended, it ought not to be forced upon the assured, and it may be fairly presumed that the assured has not intended to bind himself to the exact and literal fulfillment which a warranty requires unless the language used clearly and unequivocally evidences that intent. Take the single instance of a misdescription in fire policies; the cases are numerous where the error is clearly that of the insurer's authorized agent, upon whom the assured was justified in relying in preparing the application.[74] And there is every reason for construing such descriptive matters as representations, rather than warranties, unless, as above stated, the terms of the contract are such as to exclude all grounds for doubt whether a warranty was intended; although in all cases the fair import of the words used, when unqualified by other terms of the policy, should be considered, especially so where it is evident that both parties clearly understood their meaning and the character of the risk, and the subject matter is such that the language employed would be meaningless unless used as a warranty, and even then it is decided in New York that the words "detached one hundred feet" must be held to mean detached one hundred feet from any other building of such a size and character as to constitute an exposure and increase the risk, and that the words were a warranty to this extent only, and that the warranty was not broken by the fact that there was a small frame building standing seventy-five feet from the subject of insurance which was found not to be an exposure and not to affect the risk.[75] We would therefore suggest that

[73] Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183, per Gray, J.

[74] See chaps. on agency herein, and see Cumberland Valley Mut. Ins. Co. v. Schell, 20 Pa. St. 31.

[75] Burleigh v. Gebhard F. Ins. Co., 90 N. Y. 220, one judge dissenting; Noone v. Transatlantic Ins. Co., 88 Cal. 152; 26 Pac. Rep. 103.

too much care and caution cannot be exercised in determining whether the statements in the application, etc., are intended to be made a warranty or not by the parties. Arbitrary decisions based upon the strict rules of construction in early marine cases, while they may declare an abstract principle of law correctly, frequently overlook the manifest intentions of the parties in the particular case. It is as much for the interest of the assurer as the assured that the contract of insurance should continue to rest upon that good faith upon which it was founded, and which is still supposed to underlie the dealings between the parties. The entire contract in each case should be fairly tested by such rules of construction as are applicable,[76] for the purpose of ascertaining and effectuating the intention of the parties, having in view the nature and subject matter of the insurance.[77]

§ **1961. Whether Stipulation on Face of Policy as to Preservation of Property after Loss is Warranty.**—It is held that a condition on the face of the policy which requires the assured after loss to use his best efforts to protect the property and prevent further loss is not a warranty, the breach of which vitiates the contract.[78] And the clause, "In case of loss or misfortune it shall be the duty of the parties in-

But see Frost v. Saratoga Mut. Ins. Co., 5 Denio (N. Y.), 154; 49 Am. Dec. 134; Day v. Conway Ins. Co., 52 Me. 60.

[76] See sec. 1949, herein, and chaps. ix. x.

[77] Examine Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183, per Gray, J.; Sayles v. Northwestern Ins. Co., 2 Curt. (C. C.) 616; Rockford Ins. Co. v. Nelson, 65 Ill. 415; Ripley v. Astor Ins. Co., 17 How. Pr. (N. Y.) 444; De Armand v. Home Ins. Co., 28 Fed. Rep. 603; Albion Lead Works v. Williamsburgh City Ins. Co., 2 Fed. Rep. 479; Eastern R. R. Co. v. Relief F. Ins. Co., 98 Mass. 420; Girard F. & M. Ins. Co. v. Stephenson, 37 Pa. St. 293; Monlor v. American Ins. Co., 111 U. S. 339; Schmidt v. Peoria etc. Ins. Co., 41 Ill. 296; Campbell v. New England Ins. Co., 98 Mass. 381; Mullaney v. National Ins. Co., 118 Mass. 393; Rumsey v. Phœnix Ins. Co., 2 Fed. Rep. 429; 1 Fed. Rep. 396, and cases cited; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Lang v. Hawkeye Ins. Co. (Iowa), 39 N. W. Rep. 86; Clinton v. Hope Ins. Co., 45 N. Y. 454; Northwestern B. & Mut. Aid Assn. v. Cain, 21 Ill App. 47; Rawle v. N. M. L. Ins. Co., 27 N. Y. 282; 84 Am. Dec. 280; Delonguemere v. Tradesman's Ins. Co., 2 Hall (N. Y.), 589.

[78] Cincinnati & Firemen's M. Ins. Co. v. May, 20 Ohio, 229.

sured . . . . to use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured," is held not a warranty to be strictly observed, but an agreement to use such reasonable and proper means for the stipulated purpose as a competent person would have been expected to use under the circumstances.[79]

§ 1962. Warranty not Necessarily Material—Its Materiality not Subject of Inquiry.—Where it clearly appears by the express terms of the policy or from the entire contract that a warranty was intended, the materiality of the fact, matter, or circumstance warranted is not a subject of inquiry in aid of the assured; for the latter in such case will be held strictly to his contract, however immaterial the matter warranted may be.[80] And the rule is the same whether the condition relates to matters precedent or subsequent;[81] and evidence to show

[79] Franklin Ins. Co. v. Cobb, 2 Cin. Sup. Ct. (Ohio) 87. See Ellsworth v. Ætna Ins. Co., 89 N. Y. 186. The New York standard policy provides that if property is so endangered by fire as to require removal to a place of safety, the insurers are liable. And see White v. Republic F. Ins. Co., 57 Me. 91; 2 Am. Rep. 22; Balestraced v. Firemen's Ins. Co., 34 La. Ann. 844; Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415; Cory v. Boylston Ins. Co., 107 Mass. 140; Whitehurst v. Fayetteville Mut. Ins. Co., 6 Jones (N. C.), 352; Gloucester Ins. Co. v. Younger, 2 Curt. (C. C.) 322; Starkey v. Western Ins. Co., L. R. 3 Ex. 71.

[80] Fitch v. American etc. L. Ins. Co., 59 N. Y. 557; Thomas v. Fame Ins. Co., 108 Ill. 91; Cazenove v. British Equitable Assur. Co. Mut. B., 6 Bligh, N. S., 437; affirmed, 29 L. J. C. P. 160; Mutual B. L. Ins. Co. v. Cannon, 48 Ind. 264; Connecticut Mut. Ins. Co. v. Pyle, 44 Ohio St. 19; State Mut. Ins. Co. v. Arthur, 30 Pa. 315; Stone v. City F. Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Johnson v. Dakota Ins. Co., 45 N. W. Rep. 799; Duncan v. Sun F. Ins. Co., 6 Wend. (N. Y.) 488; Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497; O'Neil v. Buffalo F. Ins. Co., 3 N. Y. (3 Comst.) 122; Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381; Miles v. Connecticut Mut. Ins. Co., 3 Gray (Mass.), 580; Wood v. Hartford Ins. Co., 13 Conn. 533; 35 Am. Dec. 92; Mutual B. L. Ins. Co. v. Miller, 39 Ind. 475; Fowler v. Ætna F. Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460; Johnson v. Maine & N. B. Ins. Co. (Me.), 22 Atl. Rep. 107. But see Maskie v. Pleasants, 2 Bisn. 63. A warranty need not be material to the risk, since the very obligation imported by a warranty is that it is material: Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405.

[81] Duncan v. Sun F. Ins. Co., 6 Wend. 488; 22 Am. Dec. 539.

the falsity of the matters warranted, as in case of encumbrances and the distance away of other buildings, is improperly stricken out.[82] The California code, however, imports the question of materiality into a warranty in two distinct sections; as where it provides that either party may rescind for "the violation of a material warranty or other material provision of the policy," and again that the breach of an immaterial provision does not avoid the policy except the policy declares "that a violation of a specified provision thereof shall avoid it." [83]

§ **1963. Materiality of Fact to the Risk may in Certain Cases be Subject of Inquiry.**—Although evidence of the materiality of the matters stated may not be shown for the purpose of defense in cases of the character above stated, yet it may be admitted for the purpose of showing to what the warranty refers, or whether certain matters claimed to be within the warranty are so included or not. Thus, in a New York case, although the question whether the evidence was admissible or not did not arise in the appeal decision, yet the court decided upon the evidence and the facts found by the trial court that a certain building was of such a size and character that it was not an exposure affecting the risk, although it was within the prescribed limits under the warranty that the building within which the insured property was located was "detached at least one hundred feet." [84] And it is also held that the question as to the materiality of the statements in an application and the knowledge of the applicant is properly one for the jury, whether such statements are deemed warranties limited in their character or mere representations.[85] So in cases of slight attacks of sickness and the like the materiality is by some courts permitted to be a matter of evidence, probably not for the purpose of impeaching the warranty, but to show to what the warranty relates and what it covers, and to prevent

[82] State Ins. Co. v. Jordan, 24 Neb. 358; 38 N. W. Rep. 839.

[83] Deering's Annot. Civ. Code Cal., secs. 2610, 2611. See sec. 1948, herein.

[84] Burleigh v. Gebhard F. Ins. Co., 90 N. Y. 220.

[85] Garcelon v. Hampden Ins. Co., 50 Me. 580.

including by implication more than the warranty clearly and unequivocally imports. Thus, in a New York case where the statements in the application were warranted true, and the insured stated that he had never had any illness or local disease, and had never been attended by a physician, and that he was a traveling agent. Some years prior thereto he had had a slight disease of the eyes, known as "conjunctivitis," and had been professionally attended by a physician nearly a month, and had also been a painter by trade, and it was held a question for the jury whether this was material and should have been stated.[86]

§ 1964. Warranty—Mistake—Want of Knowledge of Untruth—Fraud—Good or Bad Faith.—Where it clearly appears from the express terms of the policy or from the entire contract that a warranty was intended, evidence is inadmissible to show that the matter warranted, which is untrue in fact, was made through mistake,[87] and its falsity avoids the contract irrespective of the insured's intention in making the statements.[88] And this is so even though there is no fraud, although in such case the premium is returnable.[89] So an intent to defraud is not a constituent element of a defense to an action on a life insurance policy based upon a breach of a warranty of the truth of representation;[90] for the rule is settled that if an affirmative warranty is false the contract is avoided, and the assured is not aided by the fact that there was no fraudulent intent on his part.[91] And so it is immaterial

[86] Fitch v. American Popular L. Ins. Co., 59 N. Y. 557; reversing 2 N. Y. Sup. Ct. 247.

[87] Cooper v. Farmers' etc. Ins. Co., 50 Pa. St. 299; Gluting v. Metropolitan etc. Ins. Co., 21 Vroom (50 N. J.), 287; 13 Atl. Rep. 4. "It is no avail to plead inability, accident, or even operation of a peril insured against as an excuse for noncompliance with an express warranty": McArthur on Marine Insurance, ed. 1890, 37.

[88] Cobb v. Covenant Mut. B. Assn., 153 Mass. 176; 26 N. E. Rep. 230.

[89] Connecticut Mut. L. Ins. Co. v. Pyle, 44 Ohio St. 19.

[90] Sullivan v. Metropolitan L. Ins. Co. (C. P.), 36 N. Y. St. Rep. 38; 12 N. Y. Supp. 923.

[91] Holloway v. Dwellinghouse Ins. Co. (St. L. C. A. 1892), 21 Ins. L. J. 379; Stensgaard v. St. Paul R. E. Title Co., 50 Minn. 429; 52

whether the assured acted in good or bad faith,[92] or whether he knew the statements to be untrue or not,[93] or whether the answers were intentionally false or in accordance with his belief,[94] or whether he believed them true or not,[95] although on this last point the rule is subject to some qualification.[96] In marine risks it is immaterial whether a breach of warranty arise from fraud, negligence, misinformation, or any other cause; the effect is the same in avoiding a marine policy.[97] And warranties by an applicant for life insurance will be strictly applied, and misstatements made innocently, by mistake, inadvertence, or from false information afforded by others, are fatal to the contract, but such warranties will be strictly applied and limited to the precise undertaking of the party making it.[98]

§ 1965. Warranty may be Qualified by Other Words in the Contract.—Although a matter may be expressly warranted, yet the warranty may be qualified by other words in the contract, in which case it is not absolute, but the contract will be governed by the qualifying words, or the matter will become in effect a representation merely; as where the policy made certain statements as to the condition of the house a warranty, but the application qualified the same by the words "material to the risk," it was held that unless the promise was "material" its breach would not avoid the policy.[99]

N. W. Rep. 910; Clemens v. Supreme Assembly R. S. of G. F., 131 N. Y. 485; 43 N. Y. St. Rep. 571; 30 N. E. Rep. 496.

[92] Commonwealth Mut. F. Ins. Co. v. Huntzinger, 98 Pa. St. 41.

[93] Mutual B. L. Ins. Co. v. Cannon, 48 Md. 264; Mutual B. L. Ins. Co. v. Miller, 39 Ind. 475.

[94] Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42.

[95] Commonwealth Mut. F. Ins. Co. v. Huntzinger, 98 Pa. St. 41; Johnson v. Maine & N. B. Ins. Co. (Me.), 22 Atl. Rep. 107.

[96] Fitch v. American Popular L. Ins. Co., 59 N. Y. 557; reversing 2 N. Y. Sup. Ct. 247; Dilleber v. Home L. Ins. Co., 69 N. Y. 256; sec. 1848, herein.

[97] Fowler v. Ætna F. Ins. Co., 6 Cow. 673; 16 Am. Dec. 460.

[98] Equitable L. Ins. Co. v. Hazlewood, 75 Tex. 338; 16 Am. St. Rep. 893.

[99] Waterbury v. Dakota F. Ins. Co., 6 Dak. 468; 43 N. W. Rep. 697, Redman v. Hartford F. Ins. Co., 47 Wis. 89; 32 Am. Rep. 751; Fitch v. American etc. L. Ins. Co., 59 N. Y. 557.

§ 1966. When Matters of Description or Facts Relating to Property are Warranties.—As already stated, matters of description or facts relating to property are held in certain cases to constitute representations merely,[100] but as will be noted from the following decisions such matters and facts are frequently held to be warranties. Thus, if it appears that the property was insured as described at special rates, it is a warranty that the property is and will continue to be of the character specified,[101] and if a descriptive statement was intended to be a substantive part of the contract, it will ordinarily be held a warranty.[102] So if the description of the property is in express terms of the policy made a warranty, it is, as a general rule, a condition precedent to recovery and a warranty,[103] and if the warranty be in such case in futuro, it is immaterial that the insurer had knowledge that the facts did not exist as stated at the time the policy was issued.[104] It is declared in New York that the rule holds in fire as well as in marine insurance that the description of the property in the policy is a warranty by the insured,[105] and as a rule a description of a vessel in a marine policy is a warranty.[106] So a statement as to the kind of materials entering into the construction of a building is a warranty; as that the house in which the goods insured were contained was a "two-story frame house filled in with brick."[107] And where a written clause describes the location of the building, the materials of which it is constructed, and the purposes for which it is used, this constitutes a warranty in praesenti, but not a continuing warranty.[108] If an

[100] See sec. 1911, herein.

[101] Wood v. Hartford Ins. Co., 13 Conn. 533; 35 Am. Dec. 92.

[102] Hopkins on Insurance, 181.

[103] Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268; 18 Am. Rep. 681.

[104] Michigan Shingle Co. v. L. F. Ins. Co., 91 Mich. 441; 51 N. W. Rep. 1111.

[105] Fowler v. Ætna Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460.

[106] Fowler v. Ætna Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460; Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404; Barring v. Claggett, 3 Bos. & P. 201; 5 East, 398; Goix v. Low, 2 Johns. Cas. (N. Y.) 480; Lewis v. Thatcher, 15 Mass. 431.

[107] Fowler v. Ætna F. Ins. Co., 6 Cow. (N. Y.) 673.

[108] United States etc. Ins. Co. v. Kentucky, 34 Md. 224.

insurance is effected upon a vessel in a port other than that to which she belongs, and descriptive words are used, they will be construed with reference to the meaning attached to those words by the usage of the port to which the ship belongs, and not of that where the policy is effected; for the underwriters are assumed to have knowledge of the usages of the port to which the vessel belongs, and the assured is not presumed to know those of the port where she is insured. This is so held where the vessel was described as "newly coppered," the term "coppered ship" not having the same meaning in both ports.[109] But this rule must be held subject to such exception as the nature of the usage and the relation thereof to the subject matter of insurance necessitates.[110] So in matters of description made a warranty by the terms of the policy, the nature of the warranty and the subject matter must not infrequently be a material factor in determining what compliance therewith is necessitated. Thus, where it was stated that a certain building was to be removed to a certain distance away from another, a reasonable time must be allowed for compliance, and what constitutes a reasonable time is a question for the jury.[111] Other matters of description relating to use and occupation, location, etc., are considered herein under other heads.

§ **1967. Where Time to which Affirmative Warranty Relates is Specified.**—If the warranty relates to a specific period of the time, it cannot be extended by construction beyond that period; as where it was warranted that the insured had "no chronic disease at the time it was made," in such case the evidence must clearly show, in order to avoid the policy, that the disease relied on as proving the warranty false existed when the insurance was effected.[112]

[109] Hazard v. New England Mar. Ins. Co., 8 Pet. 557; reversing 1 Sum. 218.

[110] See 2 Duer on Marine Insurance, ed. 1846, 668.

[111] Lindsey v. Union Mut. F. Ins. Co., 3 R. I. 157.

[112] Murphy v. Mutual B. L. & F. Ins. Co., 6 La. Ann. 518. "There is not sufficient evidence that the disease existed at the time the life was insured. It is true that the opinion is expressed, from the post

§ **1968. Where Time to which Affirmative Warranty in Life Risk relates is Indefinite.**—Where in a life risk the inquiry, upon the answer to which the warranty is based, is not definite as to time, it cannot by construction be held to extend over the whole period of the life insured.[113]

§ **1969. Partial Answers.** — If partial answers are made, the warranty will not be extended beyond the answer or beyond what the answer fairly imports within the ascertained intent of the parties.[114] This point is, however, more fully discussed under the chapter on "representations," to which the reader is referred.

§ **1970. Breach—Warranty must be Strictly True and Exactly and Literally Fulfilled.**—A warranty in a contract of insurance must, if affirmative, be strictly and exactly true, and if promissory, must be literally fulfilled; the validity of the entire contract depends thereon, otherwise it becomes void. No departure can be allowed in the slightest particular in any matter warranted. The very purpose and meaning of a warranty is to preclude all questions for what purpose it was made, or whether it was made for any purpose at all by the insured. Once it is inserted in the policy or made a part thereof by proper reference, it binds the assured as made, it matters not whether the breach proceeds from fraud, negligence, misinformation, or to what cause noncompliance is attributable. If it be an affirmative warranty and is false, there is a breach; if it be promissory and is not strictly performed, the contract

mortem examination, that the disease was of long standing. These are indefinite terms, and do not necessarily show that it existed when the policy was granted."

[113] World Mut. L. Ins. Co. v. Schultz, 73 Ill. 586; 5 Ins. L. J. 34. Upon appeal, the court said: "The question was not whether he had been subject to a disease, but whether or not he is subject to said disease. Most certainly, the jury were justified in finding that there was no breach of warranty." We are of the opinion that the question was not sufficiently definite and specific as regards time to warrant the finding of a breach of warranty.

[114] Dilleber v. Home L. Ins. Co., 69 N. Y. 256; 25 Am. Rep. 182; Pennsylvania Mut. L. Ins. Co. v. Miller, 100 Ind. 92.

is vitiated. As to the latter there is, says Lord Mansfield, no latitude, no equity. The only question is, Has the event happened? If not, there is no contract.[115] The assurer is released by a breach of warranty in a policy of insurance, whether the breach diminished or increased the risk, or was committed for good or bad reasons, or with or without the consent of the insured,[116] or that the act was done by a tenant of the insured without his knowledge or authority.[117] So in case of a warranty to sail on a day certain, and the ship was ready to sail, and would have sailed, but being restrained by order of the

[115] Nicoll v. American Ins. Co., 3 Wood & M. (C. C.) 529; Lothlan v. Henderson, 3 Bos. & P. 815, per Lawrence, J.; Hibbert v. Pigou, reported in 1 Marshall on Insurance, ed. 1810, *370, *370 a, per Lord Mansfield; Hore v. Whitmore, Cowp. 784; Bond v. Mut, Cowp. 601, per Lord Mansfield; Mizele v. Burnett, 4 Jones (N. C.), 249; Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio (N. Y.), 75; Poussard v. Spurs, L. R. 1 Q. B. D. 410; Roberts v. Ætna Ins. Co., 58 Cal. 83; Fowler v. Ætna Fire Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460; Bettine v. Gye, L. R. 1 Q. B. D. 460; Sayles v. Northwestern Ins. Co., 2 Cent. 610; Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Buford v. New York L. Ins. Co., 5 Or. 334; Vose v. Eagle etc. Ins. Co., 6 Cush. (Mass.) 42; Lycoming Ins. Co. v. Mitchell, 48 Me. 367; Wheeler v. Connecticut Mut. L. Ins. Co., 82 N. Y. 544; Higbee v. Guardian L. Ins. Co., 53 N. Y. 603; 66 Barb. (N. Y.) 462; Witherell v. Maine Ins. Co., 49 Me. 200; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; State etc. Ins. Co. v. Arthur, 30 Pa. St. 315; Alabama G. L. Ins. Co. v. Johnson, 80 Ala. 467; 2 S. Rep. 125; Kelsey v. Universal L. Ins. Co., 35 Conn. 225; 1 Marshall on Insurance, ed. 1810, *347, *348. "No cause, however sufficient, no motive however good, no necessity however irresistible, will excuse noncompliance with an express warranty. If it be not in fact complied with, though for the best reasons, the policy is void": 1 Arnould on Insurance, Perkins' ed. 1850, 587, *584, 1 Arnould on Insurance, Maclachlan's ed. 1887, 604. "The meaning of a warranty precludes all question, whether it has been substantially complied with or not": Hammond on Fire Insurance, ed. 1840, 82. A warranty must be strictly complied with and literally fulfilled: Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405. "A warranty must be strictly or literally complied with, for the very meaning of the words precludes all questions as to substantial compliance": 1 Biddle on Insurance, ed. 1893, 557. A strict rather than a substantial compliance with warranties required: Western Assur. Co. v. Altheimer, 58 Ark. 565.

[116] Wood v. Hartford Ins. Co., 13 Conn. 533; 35 Am. Dec. 92; Diehl v. Adams Co. M. Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302.

[117] Diehl v. Adams Co. M. Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302.

government it sailed after the day named and was captured, the detention was held no excuse for breach of the warranty, even though the policy contained the clause against "restraints and detainments of kings, princes, and people" expressly within the protection of the policy.[118] And so although the warranty be afterward and before the loss complied with, the policy is vitiated for noncompliance when the risk commences.[119] And if a matter is warranted to be of a particular nature or description, it must conform exactly to the terms of the warranty.[120] In applying the rule above stated care should be taken to distinguish those cases where exact truth and literal compliance is necessary and those where it is sought by construction to extend the warranty beyond what it clearly imports; for while the assured is held strictly to what he has agreed, he is held only to what he has warranted, and nothing more. A strict compliance with a warranty ought to operate as well in favor of as against the assured whenever he can bring himself within its terms.[121] Thus, in a case already noted of a warranty that a ship shall carry twenty guns, if that number of guns are carried the warranty is fulfilled; she is not obligated to carry the full complement of men to work them.[122]

§ 1971. Is there a Tendency to Relax the Above Rule? As bearing upon the question whether there is a tendency to relax the above rule in regard to warranties, the words of McCormick, C. J., in a comparatively recent case[123] are important. They are: "Where insurance is effected as marine insurance formerly was and generally is still written, the situation of the parties require the exercise of the utmost good faith. In en-

[118] Hore v. Whitmore, Cowp. 784. See Bond v. Nutt, Cowp. 601, per Lord Mansfield.

[119] Rich v. Parker, 7 Term Rep. 705.

[120] Newcastle F. Ins. Co. v. Macmorran, 3 Dowl. Pr. 255, per Lord Eldon.

[121] See Kemble v. Rhinelander, 3 Johns. Cas. (N. Y.) 134, per Kent, J.

[122] Hyde v. Bruce, 3 Doug. 213; reported 1 Marshall on Insurance, ed. 1810, *347 a. See, also, Burleigh v. Gebhard Ins. Co., 90 N. Y. 220.

[123] Western Assur. Co. v. Redding, 15 U. S. C. C. A. 622, 623; 68 Fed. Rep. 708.

forcing this requirement against unfaithful parties rules were advanced and followed which conditions then existing demanded, but by reason of the gradual and great development of a change in relation to the parties to these contracts these rules, though once wholesome and necessary, have become severe, and with the well-known tendency toward the growing weight of precedent have often been applied to cases and in a manner not within Lord Mansfield's reasonings. He says, with his peculiar force: 'A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract.'[124] Out of the business of marine insurance, or superinduced thereby, the business of fire and life insurance has sprung and grown till it fills all the land, and its cases overflow the courts and their reports. The relations of the parties are reversed. The policies in current use are travesties on the common-sense form in use in marine insurance, and while the distinctions and construction announced in Pawson v. Watson[125] and in De Hahn v. Hartley[126] are too well settled to be disturbed by judicial action, there has long been a marked and growing judicial sense that the application of these and later cases in line with them should not be carried beyond the boundaries of controlling precedents; that common honesty and common sense are safe guides in the construction of even these wonderfully devised contracts. While, therefore, it is certainty the law that a precedent condition warranted to exist must in fact exist exactly as stated or there will be no contract, because the minds meet only on all the stipulated conditions, a promissory warranty is often, if not always, necessarily a condition subsequent, and courts should and do, and will, apply to these the doctrines that obtain in adjudging forfeitures." So in Indiana it is decided that in order to avoid a policy on account of breach of warranty as to the value of the property insured, there must be a substantial breach.[127]

[124] De Hahn v. Hartley, 1 Term Rep. 343.
[125] Cowp. 785.
[126] 1 Term Rep. 343.
[127] Phœnix Ins. v. Pickel, 119 Ind. 155; 12 Am. St. Rep. 393.

§ 1972. Exceptions to Above Rule—What Excuses Compliance with Warranty.—We have already noted decisions which hold that a failure, the insured acting in good faith, to disclose a slight illness does not constitute a breach of warranty relating to past sickness, disease, etc.[128] And in a federal case the cargo was warranted American. The ship coming from a French port was compelled to take aboard some French invalid soldiers, together with their baggage and some household furniture, and it was decided that although such furniture was generally considered a part of the cargo and not baggage, yet there was no breach of warranty under the peculiar circumstances of the case.[129] So where the policy expressly stipulated that "ashes are kept at all times in brick," it was held a sufficient compliance if they were kept in some other equally safe way. We would suggest, however, that this case could well support the principle that what is intended by the warranty should first be clearly ascertained, and it should then be strictly complied with according to the intent of the parties.[130] So in an Illinois case it was stipulated that a certain number of buckets "filled with water" should be kept on the first floor and others in the basement "ready for use at all times in case of fire," but the court held that this was merely an agreement not requiring a literal compliance which might be impossible, as in the winter season when no fires were allowed in the building, and that it was sufficient if the required number of buckets were kept at the specified places in a good and serviceable condition ready for instant use. In other words, it is apparent that the court was satisfied that a strict warranty was not intended by the parties, and that a substantial compliance satisfied the stipulation. This case could also be well decided to support the principle stated as underlying the last case.[131] And in case of a

[128] See secs. 1848, 1849, herein; Dilleber v. Home L. Ins. Co., 69 N. Y. 256.

[129] Vasse v. Ball, 2 Dall. (C. C.) 270.

[130] Underhill v. Agawam Mut. F. Ins. Co., 6 Cush. (Mass.) 440. See Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, where the court held similar statements as representations to save a forfeiture.

[131] Aurora F. Ins. Co. v. Eddy, 49 Ill. 106.

warranty to sail with convoy the insurers are not discharged if the vessel sails with convoy but is separated therefrom by stress of weather and does all in her power to rejoin the convoy, although convoy for the voyage is intended by the usual warranty.[132] So if the reason of the rule ceases, it would seem that the rule would cease; as where the warranty is that a ship shall sail with convoy, this has reference to a state of war, and if peace should intervene before the time for performance of the warranty, compliance ought to be excused.[133] The rule requiring strict compliance must be held to refer to warranties clearly and understandingly made, for if the assured is, by reason of the express declarations and explanations contained in the papers prepared by the insurer and made a part of the contract, thrown off his guard and induced by reliance thereon to enter into a warranty, such declarations and explanations must, if possible, be construed together with the warranty, and if the construction raises a doubt, the assured will be excused from a strict compliance with the warranty, and be held only to compliance therewith as qualified by the inducing declarations. Thus, where said statements of the company are that only dishonesty or inexcusable carelessness will jeopardize the insurance, and that fraud or intentional misrepresentation violates the policy, and the payment will be contested only in case of fraud, such declarations are inconsistent with the legal effect of a warranty, and strict compliance is excused.[134] A valid warranty may by a subsequent legislative enactment become illegal, and compliance therewith will there-

[132] Jeffrey v. Legendra, 3 Lev. 329; 2 Salk. 443; 1 Show. 320; 4 Mod. 58; 1 Marshall on Insurance, ed. 1810, *376, *378. See Audley v. Duff, 2 Bos. & P. 111.

[133] 2 Duer on Marine Insurance, ed. 1846, 702. "The only legitimate grounds for noncompliance are, either such a change of circumstances as to render the warranty inapplicable, as in the case of a vessel 'warranted to sail with convoy' if peace were proclaimed before the ship sailed, or the making of a law rendering its fulfillment illegal subsequent to the agreement to insert a warranty being entered into and prior to the time for its execution": McArthur on Marine Insurance, ed. 1890, 37.

[134] Fitch v. American etc. L. Ins. Co., 59 N. Y. 557.

after be excused. This follows by analogy from the law applicable to other contracts,[135] although if such statute be afterward repealed before the time for compliance, the obligation would by analogy with a Massachusetts case, be suspended during the existence of the law, and would revive on appeal.[136]

§ **1973. What Excuses Compliance—Waiver.**—The breach of a warranty may be waived by the insurer; as where a vessel while lying at Rotterdam, a port north of Antwerp, was insured in January under a warranty not to use ports in Europe north of Antwerp between November and March.[137] So where there was a warranty as to the size, age, and condition of the building and the number of the stovepipes therein, and the company were informed soon after the loss of the falsity of the warranty, but did not claim a forfeiture therefor and allowed successive proofs of loss to be made, objecting only to the form of the proofs, it was held that there was a waiver of the breach.[138]

§ **1974. Neglect to Read or have Application Read no Excuse.**—It is no excuse for breach of warranty that the assured is an illiterate person and that the company's agent omitted to read over the application to him,[139] nor will one who can read be heard, in the absence of fraud or mistake, to say he was ignorant of the contents, as an excuse for compliance with a warranty.[140] So in Missouri in the absence of

[135] Brewster v. Kitchen, 1 Salk. 198; Ld. Raym. 317, 321; cited in Presbyterian Church v. New York, 5 Cow. (N. Y.) 538, per Savage, J.; Ex parte Bowman, 7 El. & B. 783; Gray v. Sims, 3 Wash. (C. C.) 276; contra, Brason v. Dean, 3 Mod. 39.

[136] Baylies v. Fettyplace, 7 Mass. 325. But see chap. xi, herein. The California code provides that "when before the time arrives for performance of a warranty relating to the future, ... performance becomes unlawful, the omission to fulfill the warranty does not avoid the policy": Deering's Annot. Civ. Code Cal., sec. 2609.

[137] Reck v. Phœnix Ins. Co., 130 N. Y. 160; 29 N. E. Rep. 137; 41 N. Y. St. Rep. 25; 45 Alb. L. J. 155. But see secs. 489, 490, herein.

[138] German Ins. Co. v. Gibson, 53 Ark. 494; 14 S. W. Rep. 672. See Eddy v. Hawkeye Ins. Co., 70 Iowa, 472; 30 N. W. Rep. 808.

[139] Pierce v. Empire Ins. Co., 62 Barb. (N. Y.) 636.

[140] Cuthbertson v. North Carolina Home Ins. Co., 96 N. C. 480; 2 S. E. Rep. 258.

fraud or deceit, the assured is presumed to have read the application before signing it, and is acquainted with its contents, and a party who signs without reading cannot have the instrument set aside because it turns out to contain provisions contrary to his intentions or contains a mistake.[141] And in Texas it is held that the holder of a policy who has opportunity to inspect it before acceptance is chargeable with knowledge of its contents.[142]

§ 1975. **Breach of Warranty Avoids though not Cause of Loss.**—In marine risks a breach of warranty avoids the contract without regard to the fact whether such breach was not the cause of condemnation and loss; it is immaterial that the breach was in no manner whatsoever connected with or that it did not at all occasion the loss, for the warranty is a condition on which the validity of the contract rests, which failing, the contract fails, and the same rule applies in other risks.[143] Thus, in case of a life policy the fact that the disease of which the insured died was in no way connected with the breach of warranty will not aid the party in seeking a recovery.[144] So where the stipulation was that a specified number of pails of water should be kept in designated places in the building and it was not complied with, the policy was held avoided, even though the noncompliance did not cause or affect the loss,[145] although this rule does not apply to those cases where it is sought to include by implication matter not strictly within the terms of the warranty, especially where the warranty relates to a specific disease.[146]

§ 1976. **Policy Avoided by Breach of Warranty is not Revived by Subsequent Compliance.**—If a policy is

[141] School District v. State Ins. Co., 61 Mo. App. 597.

[142] Morrison v. Insurance Co., 69 Tex. 353.

[143] Goicoechea v. Louisiana Ins. Co., 6 Mart. (La.), N. S., 51; 17 Am. Dec. 175; Lothian v. Henderson, 3 Bos. & P. 515, per Lawrence, J.; Mead v. North West. Ins. Co., 7 N. Y. (3 Seld.) 530; Hibbert v. Pigou, reported in 1 Marshall on Insurance, ed. 1810, *369-70 a; Jennings v. Chenango Mut. Ins. Co., 2 Denio (N. Y.), 75.

[144] Maynard v. Rhode, 1 Car. & P. 360; 3 L. J. K. B. 64.

[145] Garrett v. Provincial Ins. Co., 20 U. C. Q. B. 200.

[146] Ross v. Bradshaw, 1 W. Black. 312; Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497. See, also, secs. 1298, 1299, 1303, herein.

avoided by a breach of a warranty, it will not ordinarily be revived by a subsequent compliance.[147]

§ **1977. Burden of Proof—Express Warranties.**—Since an express warranty is a condition precedent, the burden of proving performance rests upon the assured, but prima facie proof is only requisite in the first instance until rebutted,[148] although it is held that the burden of proof rests upon the insurer to show clearly the breach where payment is resisted on account of the misrepresentation.[149] If statements, whether oral or in writing, are referred to in the policy, parol evidence is admissible to prove them.[150]

[147] Mead v. North West. Ins. Co., 7 N. Y. (3 Seld.) 530; De Hahn v. Hartley, 1 Term Rep. 343. See sec. 2239, herein, where a substantially similar rule in regard to conditions is discussed.

[148] McLoon v. Commercial Mut. Ins. Co., 100 Mass. 472, per Gray, J.; 97 Am. Dec. 116; 1 Am. Rep. 129. In this case the court said: "Nature and form of warranty may affect the amount of evidence to be required, but whether the terms used are affirmative or negative, the warranty is equally a condition precedent, performance of which must be proven by the plaintiff to maintain an action on the policy: Arcangelo v. Thompson, 2 Camp. 620. See Roach v. Kentucky Security Fund Co., 28 S. C. 431. See secs. 154-156, herein.

[149] Davies v. National F. & M. Ins. Co. of New Zealand (H. of L. P. C. App. Eng. 1891), App. Cas. L. R. 485.

[150] Clark v. Manufacturers' M. & F. Ins. Co., 2 Wood & M. (C. C.) 472; affirmed, 8 How. (U. S.) 235. See Campbell v. Mut. L. Ins. Co., 98 Mass. 381. And examine Boggs v. American Ins. Co., 30 Mo. 63.

CHAPTER XLVI.

PARTICULAR REPRESENTATIONS AND WARRANTIES.

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§ 2044. Interest and title: Leasehold interest: Building on leased ground.
§ 2045. Interest and title: Lien.
§ 2046. Interest and title: Minor child's interest.
§ 2047. Interest and title: Mortgage, mortgagor, and mortgagee.
§ 2048. Interest and title: Ownership: Property.
§ 2049. Interest and title: Partnership interest: Exclusive ownership.
§ 2050. Interest and title: Pending litigation.
§ 2051. Interest and title: Possession.
§ 2052. Interest and title: Trust deed: Parol trust.
§ 2053. Interest and title: In trust or on commission, etc.
§ 2054. Interest and title: Stored property.
§ 2055. Interest and title: Tenant by the curtesy: Joint occupancy.
§ 2056. Interest and title: Tenant for life: Tenant in tail.
§ 2057. Interest and title: United interests of assured.
§ 2058. Interest and title: Vendee under contract for purchase: Bond for deed.
§ 2059. Interest and title: Wife's property.
§ 2060. Intention to navigate: Marine risk.
§ 2061. Insanity: Life risks.
§ 2062. Insurance beyond specified amount contrary to stipulation.
§ 2063. Iron safe: Fire risk: Keeping books, etc., in.
§ 2064. Iron safe: Keeping books, etc., in: Waiver.
§ 2065. Iron shutters: Fire risk.
§ 2066. Lading: Dunnage: Registered tonnage: Marine risk.

§ 2067. Lights: Fire risk.
§ 2068. Location.
§ 2069. Master's certificate: Warranty: Marine risk.
§ 2070. Medical attendant: Medical treatment: Life risk.
§ 2071. Medical examiner: Statements to.
§ 2072. Medical examiner: Subject of inquiry.
§ 2073. Moored safely in certain harbor: Warranty: Marine risk.
§ 2074. Occupation: Life risk: Representation and warranty: Continuing warranty.
§ 2075. Other insurance: Refusal of other insurers.
§ 2076. Opium habit: Life risk.
§ 2077. Personal, accidental, or serious injury: Wounds: Hurts: Life and accident risks.
§ 2078. Pumps: Water—Tanks filled, etc.: Fire risk.
§ 2079. Residence: Birthplace: Life risk.
§ 2080. Relative situation and distance: Other buildings: Variance in description: No warranty that location of other buildings shall remain unchanged.
§ 2081. Relationship: Life risk.
§ 2082. Sailing: Warranty to sail: Marine risk.
§ 2083. Sailing: Representation as to time of.
§ 2084. Sailing: Representation as to time of may be merely of expectation or belief.
§ 2085. Sailing: Warranty to sail may not be engrafted on a policy by parol evidence.
§ 2086. Sailing: What constitutes.
§ 2087. Sailing: What does not constitute.
§ 2088. Sheathing vessel.
§ 2089. Ship's safety: Warranty: Marine risk.
§ 2090. Smoking on premises: Continuing warranty: Fire risk.
§ 2091. Spirits on board ship: Carrying prohibited articles: Reasonable construction: Marine risk.
§ 2092. Stay of vessel at certain place limited by warranty: Marine risk.
§ 2093. Stock kept up to specified amount.
§ 2094. Stowage cargo: Warranty: Marine risk.
§ 2095. Suicide: Effect of warranty against.
§ 2096. Temperate habits: Drunkenness: Use of intoxicating liquors.
§ 2097. Tobacco: "Moderate use."
§ 2098. Trade and employment of ship: Marine risk.
§ 2099. "Uninsured": Policy on another subject matter: "Honor" policy.
§ 2100. Unmarried: Married: Widower: Wife.
§ 2101. Use and occupation: Whether continuing warranty: Fire risk.
§ 2102. Use and occupation: Constantly worked: Unlawful act not implied.
§ 2103. Use and occupation: Dwelling-house, boarding-house, hotel, etc.
§ 2104. Use and occupation: Hazardous trade or business.
§ 2105. Use and occupation: House of ill-fame.

§ 2106. Use and occupation: Manufactory.
§ 2107. Use and occupation: Manufactory: Incidental uses.
§ 2108. Use and occupation: Running factory nights.
§ 2109. Use and occupation: Stores: Storehouse: Storage.
§ 2110. Use and occupation: Stores, when continuing warranty.
§ 2111. Use and occupation: Tenants: Continuing warranty.
§ 2112. Watchman on premises: Watch-clock: Sleeping in store: Continuing warranty.

§ 1987. General Statement.—This chapter relates to those cases wherein the courts have determined the effect of certain statements made by the assured in particular matters. They are for the greater part illustrative of the principles set forth in the two preceding chapters.

§ 1988. Account of Stock—Not Continuing Warranty.[1] If the assured in answer to certain questions represents when the account of stock was last taken, its amount and that it is taken every three months, this does not amount to a warranty that it will continue to be taken regularly at such periods during the life of the policy.[2]

§ 1989. Merchandise Accounts—Inventory.—The anser "yes" in an application in reply to the question, "Do you agree to keep merchandise and cash accounts?" is a mere representation and not a warranty, though the application provides that the "applicant warrants . . . . that the foregoing is a full and true exposition of all the facts and circumstances, conditions, situations, and value of and title to the property to be insured, and is offered as a basis of the insurance requested, and is made a special warranty.[3] A warranty to make an inventory once a year is complied with if it is made one year from the date of the policy.[4]

[1] See secs. 1917, 1947, 1987, herein.

[2] Wynne v. Liverpool London & Globe Ins. Co., 71 N. C. 121. See Pelican Ins. Co. v. Wilkerson, 53 Ark. 353; 13 S. W. Rep. 1103.

[3] Ætna Ins. Co. v. Norman, 12 Ind. App. 652; 40 N. E. Rep. 1116; 24 Ins. L. J. 611.

[4] Citizens' Ins. Co. v. Sprague, 8 Ind. App. 275; 35 N. E. Rep. 720. See chapter on proofs of loss as to accounts and particular accounts.

§ 1990. Accounts Settled Monthly — Guarantee against Embezzlement.[5]—Where an insurance company issued a policy wherein it guaranteed an employer against embezzlement by one of its servants, and the application stated that the servant's accounts would be settled monthly, and accounts would be sent direct to customers every three months, and by the stipulations of the policy said statements were made the basis of the contract, it was held that a failure to comply with the representations as stipulated prevented a recovery under the policy.[6]

§ 1991. Age and Character of Building.[7]—A statement as to the age of the building will be construed as a representation, rather than as a warranty, although the policy provides that the statements in the applicaion are warranties, and that the contract is based on the representations in the application.[8] And a statement that the building was "built" in a certain year will not be construed to mean that it was constructed of new materials; the fact that it was constructed in part from materials which had been used in an old building will not make the statement a misrepresentation.[9] So where the building was described as composed of brick, but at the time of making the statement the insured declared that he was uncertain as to its being correct, and the matter was left open in order that the insured might furnish plans, which he did, showing the true character of the building, it was held that such facts being in evidence established a prima facie case for the jury.[10] Where the property insured was described as the

[5] See sec. 1987, herein.

[6] Haworth & Co. v. Sickness & A. Assur. Assn., Lim., 28 Sc. L. R. (Sc. Ct. Sess. 1891), 394; Towle v. National Guardian Assur. Soc., 7 Jur., N. S., 1109; 30 L. J. Ch. 900. See Lee v. Jones, 14 Com. B., N. S., 386; Small v. Carrie, 22 L. T. 168; Hamilton v. Watson, 12 Clark & F. 109.

[7] See sec. 1987, herein.

[8] Rogers v. Phœnix Ins. Co., 121 Ind. 570; 23 N. E. Rep. 498; Eddy v. Hawkeye Ins. Co., 70 Iowa, 472; 30 N. W. Rep. 808. See Phœnix Ins. Co. v. Pickel, 3 Ind. App. 332; 29 N. E. Rep. 432.

[9] Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238.

[10] Woods v. Atlantic Mut. Ins. Co., 50 Mo. 112.

"Hotel Central, a two-story metal roof building," and it appeared that a part of the building was only of one story, it was held that this fact did not avoid the policy where it also appeared that the property was insured as a whole, and that it was the intention of both parties to insure such building.[11]

§ 1992. Age of Insured—Age of Parents—Life Risk.[12] If the policy provides that it shall be void if any statements in the application are in any respect untrue, the declarations of the assured as to his age are treated as warranties in effect.[13] So where it is stipulated that the application shall form the basis of the contract and the statements strict warranties, and in case of any untrue statements that the insurer's liability shall be limited, and the rules of a voluntary association limit the age within which persons may become members, a misrepresentation by an applicant as to his age so as to enable him to come within the limit avoids the policy, and it is so far invalid that the act of the treasurer in thereafter receiving assessments with knowledge of the misrepresentation does not give life to the contract, nor is it validated by the act of other members in voluntarily paying the assessments to meet the amount of his insurance after his decease, nor by the fact that a new corporation was formed after the admission of such member, which voted that all members of the voluntary association should become associate members.[14] So the general rule undoubtedly is that a misrepresentation as to age is so far material that it bars the right of recovery upon the policy.[15] And it is immaterial that the misrepresentation was unintentional where by the terms of the policy the statement is made a warranty,[16] although it is held that a statement by the assured that he was born in 1817 when he was born in 1816 is immaterial if made

[11] Hartford F. Ins. Co. v. Moore (Tex. C. C. A. 1896), 36 S. W. Rep. 146.

[12] See sec. 1987, herein.

[13] Linz v. Massachusetts Ins. Co., 8 Mo. App. 363.

[14] Swett v. Citizens' Mut. Relief Soc., 78 Me. 541; 7 Atl. Rep. 394.

[15] United Brethren etc. Soc. v. White, 100 Pa. St. 12; Cazenove v. British Eq. Assur. Co., 6 Com. B., N. S., 437; Hunt v. Supreme Council Chosen Friends (Mich.), 7 W. Rep. 875; 31 N. W. Rep. 576.

[16] Murph v. Harris, Batty (Irish), 206.

in good faith, and does not avoid the policy.[17] Nor are the declarations of the assured as to his age made several months before the policy was issued and other statements of like character made by him subsequently to the issue of the policy admissible to prove misrepresentation as to age.[18] So it is held in Indiana that an estoppel arises against the insurer where, after proof of death and knowledge of the true age, the company allows eighteen months to elapse and an action to be brought thereon and determined without offering to rescind or refund the premiums paid.[19] It has been held that a statement by the applicant that he is a year younger than he in fact really is will avoid a policy.[20]

§ **1993. Anchorage Ground—Marine Risk.**[21]—If at the time of effecting a marine policy a letter is exhibited to the underwriter in which the writer states that he has seen the place of anchorage and considers it good, safe, and sheltered, this is not a statement of an absolute fact, but of opinion.[22]

§ **1994. Armament of Ship.—Warranty.**[23]—If a statement relating to the ship's armament at the time of sailing be written in the policy, it is not a mere representation of the state of the ship before she sails and antecedent to the voyage insured, but a warranty that the vessel had sailed with the number of men, arms, and guns specified, and if not true the policy is void, and if the money has been paid over to the insured before learning of the breach it may be recovered back by the underwriter.[24]

§ **1995. Ashes.**[25]—A policy was effected upon a schoolhouse and the application provided that "if ashes are allowed to

[17] Germain Ins. Co. v. Rudwig, 81 Ky. 223.

[18] Valley Mut. L. Assn. v. Tuwalt, 79 Va. 421.

[19] Gray v. National B. Assn., 111 Ind. 531; 11 N. E. Rep. 477. See Epes v. Arlington Ins. Co. (Va.), 8 Ins. L. J. 342.

[20] Schmitt v. National L. Assn., 84 Hun (N. Y.), 128; 65 N. Y. St. Rep. 737; 32 N. Y. Supp. 513.

[21] See sec. 1987, herein.

[22] Anderson v. Pacific F. & M. Ins. Co., 7 L. R. C. P. 65.

[23] See sec. 1987, herein.

[24] De Hahn v. Hartley, 1 Term Rep. 343; affirmed, 2 Term Rep. 186; reported in 1 Marshall on Insurance, ed. 1810, *348.

[25] See sec. 1987, herein.

remain in wood the insurers will not assume the risk." This provision was made a part of the policy. It was represented that the ashes were taken up in metallic vessels; that these were not allowed to stand, with ashes in them, on wood, and that if ashes were deposited in or near the building they were placed in brick or stone vaults. There were no such vaults and the ashes were deposited on the ground, and shortly before the fire were placed in wooden barrels. The contract was held to be avoided.[26] In the same state, however, in which this decision was rendered it was decided that a stipulation that ashes were at all times kept in brick was complied with if they were kept in some equally safe mode.[27] So it is held in Ohio that a representation in an application that ashes are "thrown out," even if construed as a warranty, must be considered as an affirmation of a previous habit of disposing of the ashes, and that leaving some of them in the building occasionally for special or extraordinary purposes, or accidentally, would not avoid the policy.[28]

§ 1996. Bodily or Mental Infirmities—Life and Accident Policy.[29]—If there be a warranty in an accident policy that the insured never had and had not then any "bodily or mental infirmity," the fact that he was subject to erysipelas does not constitute a breach.[30] Nor is nearsightedness a breach of such a warranty, especially where at the time of effecting the insurance the assured wore eyeglasses, which fact the company's authorized agent knew;[31] nor does the fact that the assured is deaf constitute a breach of the stipulation when the agent at the time had full knowledge thereof.[32]

[26] Worcester v. Worcester etc. Ins. Co., 9 Gray (Mass.), 27.

[27] Underhill v. Agawam etc. Ins. Co., 6 Cush. (Mass.) 446.

[28] Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684.

[29] See sec. 1987, herein.

[30] Bernays v. United States Mut. Acc. Assn. (C. C. E. D. Mo.), 45 Fed. Rep. 455.

[31] Cotten v. Fidelity & Casualty Co. (C. C. S. D. Miss.), 41 Fed. Rep. 506.

[32] Follette v. United States Mut. Acc. Assn., 110 N. C. 377; 14 S. E. Rep. 923.

§ 1997. Books of Account—Keeping Books in Safe.[33] No warranty that books of account shall be kept or that they shall be ready to be exhibited when called for is implied in the provision in a fire policy that the claim of loss shall be sustained if required by the books of account and other vouchers of the assured.[34] But if it is expressly stipulated that books of account shall be kept and locked in a fireproof safe at night, and that the same shall, in case of loss, be produced for inspection by the adjuster, such a condition must be substantially complied with as a condition precedent to a recovery.[35] If the policy stipulates that the books of account shall be kept in a safe at night, this will be construed in accordance with the ordinary requirements of the business and will not be held to necessitate keeping them there otherwise than during the time business has ceased, and not from sunrise to sunset.[36]

§ 1998. Cargo of Ship.—Warranty.[37]—It is held by Lord Ellenborough that an insurance "on the cargo," followed by a specific designation thereof, does not constitute a warranty that the entire cargo on board the ship shall consist of only the goods specified. The word "cargo" does not mean the whole cargo, but only, in connection with the descriptive words following, designates upon what goods the risk attaches. There is no warranty that no other goods shall be taken on board, where the risk is not thereby increased.[38]

§ 1999. Convoy—Warranty to Sail or Depart with.—The warranty in English policies in times of war that the ship will sail or depart with convoy must be strictly performed, and nothing excuses the assured from complying with such warranty. The rules governing this warranty are as follows:[39]

[33] See sec. 1987, herein.

[34] Wightman v. Western M. F. Ins. Co., 8 Rob. (La.) 442.

[35] Pelican Ins. Co. v. Wilkerson, 53 Ark. 353; 13 S. W. Rep. 1103.

[36] Jones v. Southern Ins. Co. (C. C. Ark. 1889), 38 Fed. Rep. 19; Brown v. State Ins. Co., 74 Iowa, 428; 18 Ins. L. J. 137; Liverpool L. & G. Ins. Co. v. Morris, 84 Ga. 759; 11 S. E. Rep. 895.

[37] See sec. 1987, herein.

[38] Muller v. Thompson, 2 Cowp. 610.

[39] Taken together with authorities cited from 1 Marshall on Insurance, ed. 1810. *360-84 a.

The convoy must be a regular convoy appointed by the government, and no other.[40] The sailing must be from the place of rendezvous appointed by the government.[41] The convoy must be for the voyage, as a rule,[42] although if the government does not appoint a convoy for the whole voyage, this constitutes an exception.[43] So there may be separate convoys for different parts of the voyage, and the rule may be governed by usage.[44] And a sailing to the general place of rendezvous is sailing with convoy for the voyage.[45] It is also essential that the ship insured shall have sailing instructions under this warranty, although there are exceptions in certain cases.[46] The ship must also depart and continue with convoy till the end of the voyage, unless separated by necessity.[47]

§ 2000. "Depart," Warranty to, in Marine Risk.—A warranty in a marine risk that the ship will "depart" on or before a specified day is not satisfied although the ship, being in perfect readiness for sea, has broken ground and has proceeded to sea on the insured voyage, but is beaten back to anchor within the harbor by stress of weather; she must not only have "sailed," but must be out of port and at sea on the day

[40] Smith v. Readshaw, reported in Park on Insurance, 349; Hibbert v. Pigou, reported in 1 Marshall on Insurance, ed. 1810, *369.

[41] Lethulier's case, Salk. 443; Gordon v. Morley, 2 Strange, 1265.

[42] Lilly v. Ewer, Doug. 72.

[43] D'Eguino v. Berwick, 2 H. Black. 551.

[44] Manning v. Gist, reported in 1 Marshall on Insurance, ed. 1810, *367; De Garray v. Claggett, reported in 1 Park on Insurance, ed. 1349.

[45] Audley v. Duff, 2 Bos. & P. 111.

[46] Hibbert v. Pigou, reported in 1 Marshall on Insurance, ed. 1810, *371; Webb v. Thomson, 1 Bos. & P. 5; Victoria v. Cleeve, 2 Str. 1250; Anderson v. Pitcher, 2 Bos. & P. 164; 3 Esp. 124.

[47] Taylor v. Woodness and Waltham v. Thomson, both reported in 1 Marshall on Insurance, ed. 1810, *376; Jeffrey v. Legenden, 3 Lev. 320; 2 Salk. 443; 1 Show. 320; Long v. Duff and Long v. Bolton, 2 Bos. & P. 209. See, also, for other authorities concerning convoy, Bond v. Gonzales, 2 Salk. 445; Laing v. Glover, 5 Taunt. 49; Warwick v. Scott, 4 Camp. 62; Carstairs v. Allnutt, 3 Camp. 497; Metcalf v. Parry, 4 Camp. 123; Thornton v. Lance, 4 Camp. 231; Gordon v. Morley, 2 Strange, 1265; D'Angilar v. Tobin, Holt. N. P. 185; Morrill v. Delton, 2 Selw. N. P. 992; Campbell v. Bordreu, 2 Str. 1265.

named.[48] But under a time policy a vessel was held "at sea" on the day named although she had not obtained her clearance and was prevented by head winds and heavy seas from immediately proceeding to sea.[49]

§ 2001. Examination of Property after Work—Representation.[50]—A representation by the assured that the property is examined thirty minutes after work necessitates an examination after extra, as well as after ordinary, working hours.[51]

§ 2002. Fires—Heating—Stoves—Continuing Warranty.[52]—A representation that there is "no fire in or about" the insured building "except one under a kettle securely embedded in masonry, used for heating water, and made perfectly secure against accident," refers only to the time of effecting the policy, and in not a continuing warranty, nor does it imply that no other fires shall be used than the one mentioned. Courts in such cases will not give a forced construction in aid of a forfeiture, especially where the words of the claimed warranty are in the present tense.[53] If in an application the neighboring buildings, one of which was a carpenter-shop, are properly located and described, and the purposes for which they are used stated in response to inquiries, it is neither a fraudulent concealment of material facts nor a breach of the covenants of the assured to omit to state that such carpenter-shop is heated by stoves, or to say what provisions are made for warming, unless perhaps the heating is effected in an unusual and extraordinary manner.[54] And a warranty that no

[48] Moir v. Royal Exchange Assur. Co., 4 Camp. 84, per Lord Ellenborough; 3 Maule & S. 461; 6 Taunt. 240; "Despatched from," substantially the same decision in Sharp v. Gibbs, 1 Hurl. & N. 801.

[49] Union Ins. Co. v. Tyson, 3 Hill (N. Y.), 118; citing Bowen v. Hope Ins. Co., 20 Pick. (Mass.) 275.

[50] See sec. 1987, herein.

[51] Houghton v. Manufacturers' etc. Ins. Co., 8 Met. (Mass.) 119; 41 Am. Dec. 489.

[52] See sec. 1987, herein.

[53] Schmidt v. Peoria etc. Ins. Co., 41 Ill. 296.

[54] Girard Ins. Co. v. Stephenson, 37 Pa. St. 293; 78 Am. Dec. 423.

stoves are used, where the language is in the present and not the future tense, is not a continuing warranty that stoves will not be thereafter used.[55] And where there is no continuing warranty that stoves shall be kept in a safe condition for use, the insurer is liable, notwithstanding a fire is built in the stove while in an unsafe condition by the assured's servant contrary to express direction of the assured.[56] Although if by making fires in the stove it was used recklessly and in a grossly negligent manner, such use might reasonably be regarded as increasing the risk, but the evidence should clearly establish such reckless or negligent use.[57] A warranty may, however, be of such a character as that a future compliance may be necessitated. Thus, where it was stated that the stovepipe passed through the window, but it was added, "there will, however, be a stone chimney built, and the pipe will pass into it at the side," this constitutes a warranty necessitating compliance within a reasonable time, otherwise the policy will be avoided, and this even though consent of the company's secretary is given that the "within policy remains good" notwithstanding the stove has been removed.[58] The insurer is not released by the fact that a fire was carelessly kindled by the assured's wife in a stove during a time when the pipe had been partially removed.[59]

§ **2003. Health—Disease—Life Risk.**[60]—If the policy stipulates that the answers in relation to the health and condition of the assured are the basis of the contract, and that if the same are not absolutely full, true, and correct the contract will be void, or if words of like meaning are used, in such case untruthful or incorrect answers to specific questions avoid the policy, though in relation to immaterial matters. There is, however, a difference between answers to specific questions and

[55] Aurora F. Ins. Co. v. Eddy, 50 Ill. 106; 55 Ill. 213; 41 Ill. 295.

[56] Loud v. Citizens' Mut. Ins. Co., 2 Gray (Mass.), 221.

[57] Aurora F. Ins. Co. v. Eddy, 50 Ill. 106, per Waller, J.; 55 Ill. 213; 41 Ill. 295.

[58] Murdock v. Chenango Co. Mut. F. Ins. Co., 2 N. Y. 210.

[59] Mickey v. Burlington Ins. Co., 35 Iowa, 174.

[60] See sec. 1987, herein.

the failure to make full answers, for by the inquiry the matter is made material.[61] So if the policy stipulates that it is issued only on the condition that the statements of the assured concerning his health made to the medical examiner and set forth in the application are strictly true, and if untrue the contract will be void, the right to recover is dependent upon the truth of the representations so made, and the word "essentially" in a charge to the jury in such case is synonymous with "strictly." [62] If the answers as to applicant's health are untrue, the insurer's medical attendant testifying that the life was uninsurable, and the policy is stipulated to be void for misrepresentations to the medical examiner, the policy is void ab initio.[63] In Texas, if an applicant for insurance, in reply to certain questions as to whether he has had certain enumerated diseases or ailments, gives a false answer or answers, and these answers are by the terms of the contract made warranties, the policy will be avoided, though the disease or ailment may not be material, unless it also appears that the ailment was merely temporary and not inherent, and due to some unusual and extraordinary cause or causes, such as excessive

[61] Swick v. Home L. Ins. Co., 2 Dill. (C. C.) 160; Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Mutual B. L. Ins. Co. v. Wise, 34 Md. 582.

[62] Hoffman v. Supreme Council of American Legion of Honor, 35 Fed. Rep. 252 (annotated case). In this case, however, the assured had represented that he had no disease, was in good health, able to earn a livelihood, and had never had a serious illness. It was in evidence that during a period including the time of the application he had received sick benefits for permanent disability, and had, by reason of his health, changed his employment to an easier one, and had gone to certain springs for his health. And there was in addition other like evidence in behalf of defendant. Opposed to this showing, however, was the testimony of the company's official physician, of the assured's wife, and that of a number of the society well acquainted with assured's physical condition for a long time, all in favor of the assured's good health. And the jury found for the plaintiff. The testimony being conflicting, the court refused to set aside the verdict: Hoffman v. Supreme Council of American Legion of Honor, 35 Fed. Rep. 252 (annotated case). And see Watson v. Mainwaring, 4 Taunt. 763.

[63] Venner v. Sun L. Ins. Co., 17 Supr. Ct. R. (Can.) 394.

work or heat.[64] In a New York case it is held that a stipulation in a certificate of life insurance "that no question as to the validity of the application or certificate of membership shall be raised, unless such question be raised within the first two years after the date of such certificate of membership and during the life of the member therein named," is valid, and excludes the defenses that the decedent and the beneficiary falsely represented that the decedent was not then suffering, and never had suffered, from certain diseases which in fact had seriously impaired his health, and the beneficiary had no insurable interest in the life of the insured.[65] So a misrepresentation as to the health or symptoms of a serious disease in answer to specific questions, the statements being made a part of the policy, stipulated to be true and the basis of the contract, binds the assured to correct answers, otherwise the policy will be void, even though the statements be inadvertently or innocently made, and whether designedly untrue or undesignedly so.[66] And this has been so held even though the examining physician of the company reports favorably as to the risk after examination.[67] So it is held that if one has heart disease he answers at his peril, and that neither his belief that his answer is true nor his ignorance that it is untrue will make the contract valid when the answer is incorrect.[68] As a rule,

[64] Mutual L. Ins. Co. v. Simpson, 88 Tex. 333; 31 S. W. Rep. 501; reversing 28 S. W. Rep. 837.

[65] Wright v. Mutual B. L. Assn., 118 N. Y. 237; 16 Am. St. Rep. 749.

[66] Neill v. American Popular L. Ins. Co., 42 N. Y. Super. Ct. 259; Barteau v. Phœnix etc. L. Ins. Co., 67 Barb. (N. Y.) 354; 1 Hun (N. Y.), 430; Cushman v. United States Ins. Co., 7 N. Y. 72; Duckett v. Williams, 4 Tyrw. 240; 2 Cromp. & M. 348; Metropolitan L. Ins. Co. v. Demprey, 72 Md. 288; Ætna L. Ins. Co. v. France, 91 U. S. 510; Mutual B. L. Ins. Co. v. Cannon, 48 Md. 264; Scanlon v. Sceales, 6 Ir. L. L. 367; 13 Ir. L. 71; reversing 5 Ir. L. 139; Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250; Goucher v. Northwestern Traveling News Assn., 20 Fed. Rep. 596; Continental L. Ins. Co. v. Young, 113 Ind. 159; 15 N. E. Rep. 220. But see secs. 1848, 1849, herein.

[67] Smith v. Ætna etc. Ins. Co., 5 Lans. (N. Y.) 545; 49 N. Y. 211.

[68] Powers v. Northeastern etc. L. Assn., 50 Vt. 630.

however, courts will not force a construction that necessitates a forfeiture, preferring to hold the assured's statements as representations, rather than warranties, so far as the terms of the contract will permit.[69] This general rule is, however, particularly applicable where the symptoms of the disease are so far developed or manifest that they materially derange for a time the functions of a vital organ or which are so well defined and marked, as that they ought to induce a reasonable belief that the disease exists;[70] or where there have been prior attacks of the same disease of an alarming character;[71] or where the assured has suffered from acute attacks of the specified disease and has been treated therefor,[72] or has been warned by a physician as to the existence of the same;[73] or where the circumstances clearly evidence the fact that the statements relied on by the insurer must have been known by the assured to be false, or rather where they are of such a character as clearly proves a misrepresentation.[74] Reference should undoubtedly be had in all cases to the character of the question asked by the insurers. Language intended to convey, and which does convey by the ordinary rules of construction, a certain meaning should not by a forced construction be held to import more than is clearly warranted. Thus, the words "severe illness" should by reasonable construction be held to mean such an

[69] See Germania Ins. Co. v. Rudwig, 80 Ky. 235; Langdon v. Union Mut. L. Ins. Co., 14 Fed. Rep. 272; Monilor v. American L. Ins. Co., 111 U. S. 335; Alabama Gold L. Ins. Co. v. Johnson, 80 Ala. 467.

[70] Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42; Continental L. Ins. Co. v. Young, 113 Ind. 159; 15 N. E. Rep. 220; Von Lindeneau v. Desbrough, 3 Car. & P. 353; 8 Barn. & C. 586; 3 Moody & R. 45; Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250.

[71] Barteau v. Phœnix Mut. L. Ins. Co., 1 Hun (N. Y.), 430; 67 Barb. (N. Y.) 354; Foote v. Ætna L. Ins. Co., 4 Daly (N. Y.), 285; Baker v. Home L. Ins. Co., 2 Hun (N. Y.), 402; Smith v. Ætna L. Ins. Co., 49 N. Y. 211.

[72] Morrisson v. Muspratt, 4 Bing. 59; 5 L. J. C. P. 63; Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381; Maynard v. Rhodes, 1 Car. & P. 360; 3 L. J. K. B. 64.

[73] British Equitable Ins. Co. v. Great Western Ry. Co., 38 L. J. Ch. 132, 314.

[74] Everett v. Desbrough, 5 Bing. 503; 3 Moore & P. 190.

illness as has a permanent detrimental effect on the physical system.[75] There are many difficulties attendant upon any attempt to define the term "disease." An eminent medical authority[76] asserts that the term "transcends definition," and that it is first necessary to understand what constitutes health. In life insurances, however, one can be guided to a certain extent by the fact that the contract is one of good faith, and is based upon certain computations, one element of which is the probable expectancy or duration of human life, and that the controlling factor in the construction of the contract is the intent of the parties. It would seem, therefore, upon principle and by fair construction of the decided cases that the legal meaning of the term "disease," as used in connection with insurance contracts, indicates an inherent or permanent vice, some derangement of the vital functions which so far affects the physical condition that it may reasonably be held to form a material factor in estimating the possible duration of the particular life and consequent safety of the risk. A more definite rule cannot be given. A slight attack may yield readily to ordinary medical treatment and in no way permanently injure the physical system, and may tend in no way to shorten life; or it may be even more trifling in character, in no way sensibly affect the health or interfere with the assured's usual avocations. In neither of these cases ought it to be held that such attack constitutes "disease" such as the contract of insurance contemplates. But an attack of the same character may, under certain other conditions, become so serious as to be followed by results permanently injurious, in the sense that it tends to shorten life, and therefore may well be held to constitute "disease." [77] An inquiry as to a specified disease does

[75] Goucher v. Northwestern Traveling News Assn., 20 Fed. Rep. 596.

[76] 1 Hartshorne's Reynolds' System of Medicine, 17.

[77] See Life Ins. Co. v. Francisco, 17 Wall. (U. S.) 672; Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250; Chattock v. Shawe, 1 Moody & R. 498; Holloman v. Life Ins. Co., 1 Wood (C. C.), 674; Higbee v. Guardian Mut. L. Ins. Co., 53 N. Y. 603; Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587; Barteau v. Phœnix Mut. L. Ins. Co., 67 N. Y. 595; Pudutzky v. Knights of Honor, 76 Mich. 428;

not justify avoiding the policy in a case where the disease relied on as constituting a breach of the stipulation has no connection whatever with the specified disease inquired about.[78]

Illinois Masons' B. Soc. v. Winthrop, 85 Ill. 537; Alabama Gold L. Ins. Co. v. Johnson, 80 Ala. 467; 2 So. Rep. 125; Mutual B. L. Ins. Co. v. Wise, 3 Md. 599; Drier v. Continental L. Ins. Co., 24 Fed. Rep. 670; Cushman v. United States L. Ins. Co., 70 N. Y. 72; Knickerbocker L. Ins. Co. v. Trefz, 104 U. S. 197; Watson v. Mainwaring, 4 Taunt. 763, per Chambers, J.; Fitch v. American Popular L. Ins. Co., 59 N. Y. 557; 17 Am. Rep. 372; Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535; Fowkes v. Manchester & L. Ins. Co., 3 Fost. & F. 440; Boos v. World Mut. L. Ins. Co., 64 N. Y. 236; Mutual L. Ins. Co. v. Hernian, 93 Ind. 24; Murphy v. Mutual B. L. & F. Ins. Co., 6 La. Ann. 518; Horn v. American Mut. L. Ins. Co., 64 Barb. (N. Y.) 81; Co-operative Assn. v. Leflove, 53 Miss. 1; Taylor's Medical Jurisprudence, 738, et seq.; 1 Chitty's Medical Jurisprudence, 235; Anderson's Dictionary of Law, tit. "Disease"; cases under secs. 1848, 1849, 2007, 2008. herein. It is evident that the above definition is more limited than that given by eminent medical authorities, as will be seen by the following definitions: "If we regard disease in the 'abstract,' we have to deal with that which changes, fetters, renders painful, shortens, or puts an end to life, and from this point of view disease may be defined to be any condition of the organism which limits life in either its powers, enjoyments, or duration": 1 Hartshorne's Reynolds' System of Medicine, 17. "An opposite state to that of health consisting in a change either in the position and structure of parts, or in the exercise of one or more of their functions or in both. By some, disease is applied to structural change while disorder is restricted to functional derangement": Dungleson's Medical Dictionary, rev. ed., tit. "Disease." "Any departure from, failure in, or perversion of, normal physiological action in the material constitution or functional integrity of the living organism": 2 Foster's Encyclopedia and Medical Dictionary, tit. "Disease." "Any disturbance of the normal relations of the individual members of the body to each other, or of a group of visceral or other associated organs to the system at large, at once destroys the equilibrium of the natural process of the body, be of such character or located in such a part as to cause the development of different physical and physiological relations, which we are accustomed to group under the generic term 'disease.' Disease may, therefore, be of grave or trifling importance accordingly as the interference with the ordinary and natural functions of the body, be of such character or located in such a part as to cause serious and continued deviation from the usual and unimpeded course of phenomena in organs vital to health; or as it may be confined to tissues of either lower structural value or of mechanical or sensory function": Wood's Reference Handbook of the Medical Sciences, 528, article by Albert N. Blodgett, M. D.

[78] Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497.

A specifically named disease may of itself be of such a character as to necessarily convey the meaning that information only is sought as to whether the assured is habitually or constitutionally subject thereto, and in this case such a construction should be given.[79] And a distinction has been made between the statement of the fact that the assured has not been attacked by the disease and where his declaration is that he has not been habitually or constitutionally subject thereto.[80] And, as already noted, certain other exceptions are shown by the cases to have been held to exist in matters of slight or temporary illness.[81]

§ 2004. Health—"Good Health"—"Sound Health"—"Sound Body"—"Perfect Health," etc.[82]—The term "good health" does not mean absolute perfection; but is comparative. The insured need not be entirely free from infirmity or from all the ills to which the flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and to outward appearance his health is reasonably such that he may with ordinary safety be insured and upon ordinary terms, the requirement of good health is satisfied. Slight troubles, temporary and light illnesses, infrequent and light attacks of sickness not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of good health.[83] In other words the term "good

[79] Cushman v. United States Ins. Co., 70 N. Y. 72; Chattock v. Shawe, 1 Moody & R. 498; Eisner v. Guardian L. Ins. Co. (C. C. T. Mo.). 5 Ins. L. J. 613; Watson v. Mainwaring, 4 Taunt. 763.

[80] Bunyon on Life Insurance, 47.

[81] See secs. 1298, 1299, herein.

[82] See sec. 1987, herein.

[83] Goucher v. Northwestern Traveling Men's Assn., 20 Fed. Rep. 596; Galbraith v. Arlington Mut. L. Ins. Co., 12 Bush (Ky.). 29; Peacock v. New York L. Ins. Co., 20 N. Y. 293; 1 Bosw. (N. Y.) 338; Conver v. Phœnix Ins. Co., 3 Dill. (C. C.) 226; Grattan v. Metropolitan L. Ins. Co., 92 N. Y. 274; 28 Hun (N. Y.), 430; 44 Am. Rep. 372; Ross v. Bradshaw, 1 W. Black. 312; Morrison v. Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162; Hoffman v. Supreme Council

health," when used in a policy of life insurance, means that the applicant has no grave, important, or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. A mere temporary indisposition which does not tend to weaken or undermine the constitution at the time of taking membership does not render a policy void.[84] So where the question was, "Is said life now in sound health?" and the answer was, "Yes," and there was evidence tending to prove the existence of Bright's disease, it was held no error to charge the jury that in order to find the answer false they must find that the assured had some disease of a serious nature and not a temporary ailment.[85] If a benefit certificate is granted upon the express condition that the statements in the application therefor are true, but the applicant, while affirming himself to be in good health, also makes a general declaration as to the statements subscribed by him that they are true to the best of his knowledge and belief, the effect of this qualification is that recovery upon the certificate can only be defeated by showing that he knew or had reason to believe that he was not in good health at the time the application was made.[86] One case states a rule which is of a somewhat negative character, as follows: If the life would not be taken at the ordinary rates, it is not a "healthy life,"[87] and it is held that where the assured answers in perfect good faith

of A. L. of H. (C. C. Va. 1888), 35 Fed. Rep. 252; Hutchinson v. National Loan Assn., 7 Ct. Sess. (Scot.) 2 Ses. 467; 2 Big. L. & A. Ins. Cas. 444. See Co-operative Assn. v. Leflove, 53 Miss. 1. See sec. 2003 herein. "A warranty that the person whose life is to be insured 'is in good health at the time of making the policy' is to be construed in a liberal sense as regards the assured, and is not to be understood as a warranty that the person is perfectly free from the seeds of disorder. Though the person may by accident be afflicted with a particular infirmity, if his life be in fact a good one, and he be in a reasonably good state of health, so that his life may be insured on the common terms for his age and condition, the party insuring will have a right to recover": Ellis on Fire and Life Insurance and Annuities, ed. 1834, p. 62, *106.

[84] Hann v. National Union, 97 Mich. 913; 37 Am. St. Rep. 365.

[85] Brown v. Metropolitan L. Ins. Co., 65 Mich. 306; 32 N. W. Rep. 610.

[86] Hann v. National Union, 97 Mich. 913; 37 Am. St. Rep. 365.

[87] Brealey v. Collins, 1 Younge, 317.

that he is of "sound body," the policy will not be avoided although he has a fatal disease at the time.[88] But a statement that the assured is in perfect health, or language which so imports, must be strictly true.[89] In a Maine case the insured was confined by childbirth in November, 1887, and was sick of typhoid fever in January, 1888, from which she got up some time in March following. She applied for insurance March 1, 1888, was examined by the company April 18, 1888, and her application approved the 22d of the same month. On May 12, 1888, her physician found her weak, coughing, and sick with consumption, which caused her death on July 21, 1888. In her application she stated that she then was in good health and that she had usually had good health, and in a suit to cancel the policy the jury found she believed her statements to be true, but the court held that such finding was not supported by the evidence, and ordered the policy annulled.[90] If a life policy is in force, but insured, under a mistaken belief that it is not, makes a false statement as to his health in order to have the policy reinstated, this does not avoid the contract.[91]

§ 2005. Same Subject—Renewal of Policy.[92]—The rule stated under the last section applies in case a policy is returned after forfeiture on condition that the assured is "now in good health." [93] But where the policy has been forfeited and an application is made for reinstatement, the premium paid, the agent's receipt given therefor, and the assured gives the agent his certificate of health and certificate of examination signed by the company's physician, which the agent forwards to the home office, and the renewal receipt is several days thereafter forwarded to the assured from the home office

[88] Schwarsbach v. Ohio Valley Protective Union, 25 W. Va. 622.

[89] Forbes v. Edinborough L. Assur. Co., 10 Shaw & D. 451; 4 Scot. Jur. 385; Bothwick v. Langmuir, 15 Shaw & D. 1305.

[90] Maine B. Assn. v. Parks, 81 Me. 79; 10 Am. St. Rep. 240.

[91] Bridge v. National L. Assn. (N. Y. S. C., 1895), 67 N. Y. St. Rep. 297.

[92] See sec. 1987, herein.

[93] Peacock v. New York L. Ins. Co., 20 N. Y. 293; 1 Bosw. (N. Y.) 338.

and delivered to him by the agent without inquiry concerning his then state of health, the representations of the assured as to his health will be restricted to the time of applying for reinstatement and paying the premiums and are not continuous down to the day of delivery of the renewal receipt.[94]

§ 2006. **Same Subject—Refusal of Assured to Accept Renewal Receipt Conditioned as to Good Health.**[95]—If the company relies upon the fact that a renewal receipt was given after a lapse of the policy conditioned that the insured was in good health, such evidence may be met by proof that the assured at the time was in a critical condition and did not learn of the fact until afterwards, when he at once returned the same with a demand for his money or the customary receipt without such a condition.[96]

§ 2007. **Health of Assured Need not be Disclosed at Time of Renewal Except on Inquiry.**[97]—The fact that the policy has lapsed does not of itself obligate the assured to disclose his condition as to health, to make a renewal receipt valid, unless inquiry be made,[98] except perhaps a custom of the company known to the assured import such a condition into the renewal receipt.[99]

§ 2008. **Health—"Spitting of Blood"—Consumption.** Where the assured declares in answer to a question that he has not had "spitting of blood," and this is untrue, such answer is held material and a warranty, and the policy is avoided.[100] So where the assured had raised blood for two years and a half

[94] Insurance Co. v. Higginbotham. 5 Otto (95 U. S.), 380. See Homer v. Guardian etc. L. Ins. Co., 67 N. Y. 478.

[95] See sec. 1987, herein.

[96] Rockwell v. Mutual L. Ins. Co., 27 Wis. 372.

[97] See sec. 1987, herein.

[98] Rockwell v. Mutual L. Ins. Co., 27 Wis. 372. See National Mut. B. Assn. v. Miller (Ky.), 2 S. W. Rep. 900.

[99] Lewis v. Phœnix M. L. Ins. Co., 44 Conn. 73.

[100] Mutual B. L. Ins. Co. v. Miller, 39 Ind. 475; Mutual B. L. Ins. Co. v. Wager. 27 Barb. (N. Y.) 354. See Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42.

prior to his death, and had died of pleura-pneumonia shortly after the insurance was effected, the policy was held avoided;[101] and it is held that although the mere fact of spitting blood will not of itself avoid the contract, yet the fact should be stated to enable the assurer to determine whether he had the disease called "spitting of blood"; but in this case the assured had exhibited symptoms of consumption.[102] If the question is so worded that it may fairly be implied that only a categorical answer is required whether the assured has had the disease or complaint generally known and designated as "spitting or raising of blood," then the policy is not avoided by a failure to disclose a single instance of blood spitting, but the rule would be otherwise where the question is so specifically worded that it is clear that information is sought whether the assured has had single instances of spitting of blood or any spitting of blood, or symptoms thereof.[103] "The mere raising of a small quantity of blood in a single instance is not necessarily indicative of disease, nor a material circumstance so that such an occurrence, however slight, at any time during the previous life of the applicant would make his answer such a misrepresentation as to require that the court should so declare as a matter of law." [104]

§ 2009. Health—Previous Sickness or Disease.[105]—On application of husband and wife the husband's life was insured for the wife's benefit. In the application the insured stated that he had had no disease or sickness in the last seven years. The policy was conditioned to be void if the statements in the application were not in all respects true. In an action by the wife on the policy it was held that declarations by the insured prior to the application to the effect that he had been cured of

[101] Smith v. Ætna L. Ins. Co., 49 N. Y. 211.

[102] Geach v. Ingall, 14 Mees. & W. 95; 15 L. J. Ex. 37.

[103] Dreier v. Continental L. Ins. Co. (U. S. C. C. Ind. 1885), 24 Fed. Rep. 670; Pudritzky v. Knights of Honor, 76 Mich. 428.

[104] Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381. See Tucker v. United States L. & A. Assn., 133 N. Y. 548; 21 Ins. L. J. 569; Taylor's Medical Jurisprudence, ed. 1866, 760.

[105] See secs. 1848, 1849, 1987, 2003-5, herein.

a cancer about a year before was incompetent.[106] So an answer to the question whether the assured had had "diseases of the brain," or the answer to another question that he was "never sick," it is held must be taken to mean that he had never had such diseases so as to constitute an attack of sickness.[107] In case of a warranty that the answers contained in the application were full, correct, and true, the insured, in answer to a question whether he had had any disease within ten years, and if so to give name of physician, stated that he had had an attack of fever nine years before, and gave the name of the attending physician. It was held that the fact that he had had other sicknesses and physicians did not constitute a breach of warranty.[108] If the assured warrants in his application that he has usually enjoyed good health and has not had any severe disease for seven years, and within three years thereafter he dies of nervous apoplexy, it is error to refuse to admit evidence that death was the result of some disease of long standing.[109] Where the assured answers "No," to the question whether he had ever had "affection of liver," his answer may nevertheless be a "fair and true" one, although he has had slight temporary disorders of the liver resulting in permanent injury or prolonged suffering.[110] So the statement that the assured had not been sick is not falsified by the fact of his having had a slight cold.[111] If a person in an application for insurance, in answer to a question as to whether he has headache, answers "No," the fact that he has headaches when overworked will not avoid the policy.[112]

§ 2010. Health—Assured's Knowledge—Latent Disease.[113]—Where the answers are warranties and the policy is

[106] Union Cent. L. Ins. Co. v. Chever, 36 Ohio St. 201; 38 Am. Rep. 573.

[107] Knickerbocker L. Ins. Co. v. Trefz, 104 U. S. 197.

[108] Dilleber v. Home L. Ins. Co., 69 N. Y. 256; 25 Am. Rep. 182.

[109] Edington v. Ætna L. Ins. Co., 77 N. Y. 564.

[110] Connecticut Mut. L. Ins. Co. v. Union Trust, 112 U. S. 250.

[111] Metropolitan L. Ins. Co. v. McTague, 49 N. J. 587; 9 Atl. Rep. 766. See Life Ins. Co. v. Francisco, 17 Wall. (U. S.) 672; Higbee v. Guardian Mut. L. Ins. Co., 53 N. Y. 603.

[112] Mutual L. Ins. Co. v. Simpson (Tex. C. C. A. 1895), 28 S. W. Rep. 837.

[113] See secs. 1848, 1849, 1987, 2003, herein.

defended on the ground that the risk was increased by a disease, the existence of which is denied by such answers, the assured's knowledge as to their truthfulness is held immaterial.[114] So it is held that a statement that the assured has not a certain disease is not the less untrue because he has no knowledge of the existence of said disease.[115] But it is also held that the answer that the assured has no disease and is in good health does not import a warranty beyond the assured's knowledge, good faith, and reasonable belief, and not a warranty that he has not a latent disease only discoverable by post mortem examination.[116]

§ **2011. Health—Parents—Relations.**[117]—If the assured is asked whether his parents have been afflicted with specified diseases, and the clause is followed by the words "or other hereditary disease," the whole inquiry is thereby qualified, and confined to these cases in which the designated diseases are hereditary in character, and although one of the diseases named is insanity, and the parent about whom the inquiry is made has had attacks of insanity from accidental and not hereditary causes, and an uncle died insane more than twenty years prior to issuing the policy, it not being proven hereditary, this does not vitiate the policy, although a negative answer has been given.[118] But false statements as to the disease

[114] Mutual B. L. Ins. Co. v. Cannon, 48 Ind. 264; Mayer v. Equitable Reserve Fund. L. Assn., 2 N. Y. St. Rep. 79 (annotated case). See Armour v. Transatlantic F. Ins. Co., 90 N. Y. 455.

[115] Duckett v. Williams, 4 Tyrw. 240; 2 Cromp. & M. 348. See, also, Von Lindenau v. Desbrough, 3 Car. & P. 353; 8 Barn. & C. 586; Continental L. Ins. Co. v. Young (Ind.), 15 N. E. Rep. 220; Cazenove v. British Equitable Assur. Co., 6 Com. B., N. S., 437; affirmed, 29 L. J. C. P. 160.

[116] Hutchinson v. National Loan Assur. Soc., 7 C. C. S. 467; 17 Scot. Jur. 253; Schwarzbach v. Ohio Valley Prot. Union. 25 W. Va. 622; Swete v. Fairlie, 6 Car. & P. 1. See Swift v. Massachusetts Mut. L. Ins. Co., 2 N. Y. Sup. Ct. 302.

[117] See sec. 1987.

[118] Peaseley v. Safety Deposit L. Ins. Co., 15 Hun (N. Y.), 227; Gridley v. Northwestern Ins. Co., 14 Blatchf. (C. C.) 107; Insurance Co. v. Gridley, 100 U. S. 614. See Newton v. Mutual B. L. Ins. Co., 15 Hun (N. Y.), 595.

of which the assured's parents died will generally avoid the policy under a stipulation that it shall be avoided if any of the statements in the application respecting the family are untrue.[119] But in a Kentucky case, when it was stated that the father died of old age at ninety-three, which was untrue, he having died of apoplexy, aged eighty-two, and also that the mother died of old age at seventy-two, which was untrue, she having died of paralysis, aged sixty-five, it was held that the answers being made in good faith, they were not so far material as to void the contract.[120] Again, it is held that if the fact appears that the insured's parents, brothers, or sisters have died of consumption and he has not truly stated in his application the cause of their death, but has given some other cause, and the company would not have assumed the risk if the true cause of death had been known, or would only have assumed it at a materially higher premium, this will avoid the policy, regardless of the fact whether such statements are considered as warranties or representations.[121]

§ **2012. Health—Rupture—Hernia—Wearing Truss.**—In a recent Massachusetts case it is held that the question in an application for life insurance, "Are you ruptured? And if so, do you wear a well-fitting truss?" is held to relate to the time of the application, and therefore where it appears that the applicant had suffered from hernia a year previous to the application, but had recovered prior to the time of the application, it is for the jury to determine whether he was ruptured at the time he applied for insurance.[122]

§ **2013. "In Port," as Relating to Commencement of Risk—Marine Policy—Warranty.**[123]—The effect of a warranty that the ship is in port at a specified day must be construed with reference to the intent of the parties, evidenced by the

[119] Hartford L. etc. Ins. Co. v. Gray, 91 Ill. 159.

[120] Germania Ins. Co. v. Rudwig, 80 Ky. 223.

[121] Bloomington M. & L. Assn. v. Cummins, 53 Ill. App. 530; Jerrett v. John Hancock M. L. Ins. Co. (R. I. 1895), 30 Atl. Rep. 793.

[122] Levie v. Metropolitan L. Ins. Co., 163 Mass. 117; 39 N. E. Rep. 792.

[123] See sec. 1987, herein.

contract under the rules of construction applicable to the given case. If it is clear that it was the intent that the vessel should be in a specified port on a certain day as a condition precedent to the attachment of the risk, the ship must be in that port on that day. If a time policy is clearly contemplated, the place where the vessel then is, not being such a condition precedent to the commencement of the risk, and the intent is not to exclude every other port or place than the one named, then the fact that on the day named the vessel is in good safety at sea does not prevent the policy from attaching, and usage or the particular trade in which the ship is engaged may be an important determining factor.[124]

§ **2014. Incendiarism—Fire Risk.**[125]—Where the applicant stated that he did not fear, and had no reason to fear, an incendiary fire, which was untrue, it was held error to submit to the jury the question whether an attempt to fire the building was material to the risk, it being material as a matter of law.[126] In a California case the application contained the question, "Is there any incendiary danger apprehended or threatened?" and the answer was "No." It was alleged in the answer that this representation was false and fraudulent in this, that incendiary danger was apprehended by the applicant. A demurrer to the answer was overruled, and the court instructed the jury in effect that if the fact averred was proved, they should find for defendant, which was held no error.[127]

[124] Kenyon v. Berthen, Doug. 12; Manly v. United M. Ins. Co., 9 Mass. 85; Colby v. Hunter, 1 Moody & M. 81; 3 Car. & P. 7; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389; citing Manly v. United F. & M. Ins. Co., 9 Mass. 85, where Sewall, J., said: "The intent was to commence the risk on a certain day, and the intent to insure at B. was not exclusive of any other place. It is a material fact in this case that when the policy was made neither party knew when the vessel sailed from the port named, and it was the clear intent of the parties to insure on time without regard to the place where the vessel might be then, but with regard to the employment in which she was engaged."

[125] See sec. 1987, herein.

[126] North American Ins. Co. v. Throop, 22 Mich. 146; 7 Am. Rep. 638. See, also, sec. 1862, herein.

[127] Roberts v. Ætna Ins. Co., 58 Cal. 83.

§ 2015. Encumbrances—Disclosure of Title not Necessary unless Asked or Otherwise Required—Fire Risk.[128] It is a general rule that encumbrances or the particulars or state of the assured's title, or the nature or extent of his interest, need not be disclosed unless the assured is inquired of concerning the same, or unless there be some condition clearly requiring such disclosure. The policy is not avoided in such case where there is no fraudulent concealment or actual misrepresentation.[128a] If there is no warranty against encumbrances, it may be submitted to the jury whether the concealment of a mortgage, judgment liens, and mechanics' liens is willful and fraudulent, and the court may properly refuse an instruction that the nondisclosure avoids the policy as a matter of law.[129] So where no inquiry is made the policy is not vitiated by a statement by the insured that the house is his property, without disclosing that it has been mortgaged and the equity of redemption taken under execution.[130] And if a general question as to encumbrances is answered truly, but no inquiry is made as to the nature and amount thereof other than mortgages, the insurers cannot object that no information concerning the same was given, although the policy requires that the insured shall disclose his interest if it is other than the entire ownership of the property, or if encumbered by any lien.[131] A mortgagor of property procured a policy of insurance thereon in the name of the mortgagee, in pursuance of an agreement to furnish further security. No statement of the in-

[128] See sec. 1987, herein.

[128a] Bixley v. Franklin Ins. Co., 8 Pick. (Mass.) 86; Morrison v. Tennessee M & F. Ins. Co., 18 Mo. 262; Wytheville Ins. & B. Co. v. Stulz, 87 Va. 629; 15 Va. L. J. 328; 13 S. E. Rep. 77; Delahany v. Memphis Ins. Co., 8 Humph. (Tenn.) 684; Locke v. North American Ins. Co., 13 Mass. 61; O'Brien v. Ohio Ins. Co., 52 Mich. 131; Buck v. Phœnix Ins. Co., 76 Me. 586; Bartlett v. Walter. 13 Mass. 267; Bersche v. St. Louis etc. Ins. Co., 31 Mo. 555; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535.

[129] Cumberland Valley Mut. Prot. Co. v. Mitchell. 48 Pa. St. 374.

[130] Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40; 20 Am. Dec. 507. See Alkan v. New Hampshire L. Ins. Co., 53 Wis. 136.

[131] Hosford v. Germania F. Ins. Co., 127 U. S. 399, 404; 8 Sup. Ct. 1199; 32 L. Ed. 196.

terest of the assured in the property was requested when the insurance was effected, but the policy contained a clause providing that the company should not be liable "for loss of property owned by any other party unless the interest of such party be stated in the policy." The mortgagor paid the premium and afterward paid the debt. A loss having occurred, in an action on the policy it was held that the mortgagor could recover in the name of the mortgagee, and that the assured was not bound by the policy to disclose the nature and extent of his interest.[132] So a policy of insurance is not avoided on the ground of violation of a by-law of the company requiring the true title of the insured in the property to be expressed in the application for insurance where the insured is a mortgagee in possession and the application is for insurance "on dwelling-house," and states in reply to a question as to encumbrances, "First mortgage to M. W. [the name of the applicant] entered October, 1885," and in reply to a question whether the property is insured states, "Not on first mortgagee's interest," and the application contains no direct question as to the title of the applicant; for there is no misstatement of the applicant's interest, and it is the duty of the company to require fuller statements in this regard if the answers given are not sufficiently full.[133] But if a mortgagee insures a special interest, he must disclose the fact that he holds prior mortgages on the property, for by insuring a limited interest without disclosing facts which might affect its apparent solidity he induces the company to take the risk on terms which would otherwise have been declined. The insurer, in such case, is not bound to inquire as to the existence of prior encumbrances on the property from the mere fact that the mortgage includes land which could not be consumed. This is not a suspicious circumstance, for the ground might be insufficient to secure the mortgage, and thus render insurance on the consumable property mortgaged advisable;[134] but a general statement as to the amount of

[132] Norwich F. Ins. Co. v. Broomer, 52 Ill. 442; 4 Am. Rep. 618.

[133] Wyman v. People's Equity Ins. Co., 1 Allen, 301; 79 Am. Dec. 737.

[134] Smith v. Columbia Ins. Co., 17 Pa. St. 253; 56 Am. Dec. 546.

encumbrances may be a sufficient compliance with a like by-law.[135]

§ **2016. Encumbrances—Generally.**[136]—A false statement as to encumbrances or the amount of the same vitiates the policy when made a part thereof and a warranty, or where made material by stipulation or by special inquiry.[136a] So also does a material misrepresentation to a mutual company as to encumbrances avoid the contract, although the company, is established by the laws of another state, and may not in consequence have a lien on the property;[137] and the general rule applies although the policy has been assigned, the loss not having occurred.[138] But it is held where the inquiry was, "Is your property encumbered?" the word "none" in answer does not import a warranty that the property is not encumbered.[139] Although if the policy provides that only such false statements as are material to the risk will avoid the contract, a misrepresentation as to the amount of the encumbrances which is not material will not invalidate the policy.[140] Verbal notice of an encumbrance will not be a compliance with a stipulation requiring the same to be expressed in the policy,[141] although it is held otherwise in another case,[142] and

[135] Buffum v. Boyditch Mut. F. Ins. Co., 10 Cush. (Mass.) 540.

[136] See sec. 1987, herein.

[136a] State Ins. Co. v. Jordan, 24 Neb. 358; 38 N. W. Rep. 839; Hayward v. New England F. etc. Ins. Co., 10 Cush. (Mass.) 444; Shoemaker v. Glen's Falls Ins. Co., 60 Barb. (N. Y.) 84; Lang v. Hawkeye etc. Ins. Co., 74 Iowa, 673; Southern Mut. Ins. Co. v. Yates, 28 Gratt. (Va.) 585; Smith v. Agricultural Ins. Co., 118 N. Y. 522; Clark v. New England etc. Ins. Co. 6 Cush. (Mass.) 342; 53 Am. Dec. 44; Davenport v. New England Mut. F. Ins. Co., 6 Cush. (Mass.) 340; McNamara v. Dakota F. & M. Ins. Co., 1 S. Dak. 342; 47 N. W. Rep. 288; Sabotta v. St. Paul F. & M. Ins. Co., 54 Wis. 687.

[137] Davenport v. New England etc. Ins. Co., 6 Cush. (Mass.) 340. See Koontz v. Hannibal etc. Co., 42 Mo. 126; Loehner v. Home Mut. Ins. Co., 17 Mo. 247; Clark v. New England etc. Ins. Co., 6 Cush. (Mass.) 342; 53 Am. Dec. 44.

[138] Sabotta v. St. Paul F. & M. Ins. Co., 54 Wis. 687.

[139] Rockford Ins. Co. v. Nelson, 65 Ill. 415. But see Southern Mut. Ins. Co. v. Yates, 28 Gratt. (Va.) 585.

[140] Eddy v. Hawkeye Ins. Co., 70 Iowa, 472.

[141] Smith v. Farmers' Mut. F. Ins. Co., 19 Ohio St. 287.

[142] Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624.

although property may become encumbered so as to operate as a breach of a condition against encumbrances, yet such violation of the policy stipulation may be waived after loss by the acts of the company or its authorized agent.[143] Again, if a policy contains a condition of forfeiture for misrepresentation as to encumbrances and makes the statements of the insured as they appear in the policy a warranty of their truth, and the applicant gives correct answers respecting encumbrances to the general agent of the company, who fails to mention them in the policy, and procures the signature of the assured, accepts the premium, and issues the policy, the insurance company will be deemed to have waived the condition, and be held liable on the policy in case of loss.[144] It is held in Wisconsin that a representation concerning encumbrances contained in an application for insurance upon property is regarded as a warranty, and, if untrue, avoids the policy.[145]

§ **2017. Encumbrances on Property by Verbal Agreement.**[146]—The policy is not defeated where the assured states that there is an encumbrance on the same, and as a fact the encumbrance exists merely by virtue of a verbal agreement.[147]

§ **2018. Encumbrances Made after the Policy.**[148]—If the encumbrance is made after the policy is effected it does not affect it in the absence of some condition to that effect.[149]

[143] McGonigle v. Agricultural Ins. Co., 167 Pa. St. 364; 168 Pa. St. 1; 31 Atl. Rep. 868.

[144] German Ins. Co. v. Gray, 43 Kan. 497; 19 Am. St. Rep. 150.

[145] Stevens v. Queen Ins. Co., 81 Wis. 335; 29 Am. St. Rep. 905.

[146] See sec. 1987, herein.

[147] Mutual Mill Ins. Co. v. Gordon, 20 Ill. App. 559.

[148] See sec. 1987, herein.

[149] Dutton v. New England Mut. F. Ins. Co., 29 N. H. 153,. In this case, where one lien of three hundred dollars, which was upon the property at the time the application for insurance was made, and had been so stated by the insured in his application and been discharged by him before the issuance of the policy, but a new mortgage had been executed prior to the issuance of the policy, the court said: "The assured stated his title to the property truly. The only encumbrance at the time of the application was the three hundred dollars' lien. The new mortgage was not executed until six

§ 2019. Encumbrances — Judgments — Execution.[150]— A warranty against encumbrances is not broken by the fact that unsatisfied judgments exist of record against the insured property, where as a fact the judgment debtor holds receipts for the satisfaction of the same, and the others have been satisfied prior to making the application.[151] And a limited judgment which is not a lien within the intent of the question asked concerning encumbrances, and which does not extend to the property insured, does not vitiate the policy;[152] but where the judgment has been entered and constitutes a lien, it is a breach of the warranty, although the applicant informs the agent that he had given a note but did not know whether judgment had been entered up or not, and permits said agent to write in the application that there are no encumbrances.[153] So it is a good defense to an action on the policy that there are several judgment liens thereon.[154] And this is so where there is an entry of a judgment on a judgment note, even though the creditor had agreed not to enter judgment and the fact of entry was unknown to the assured till after loss.[155] So the policy is vitiated by the levy of an execution undisclosed, such liens existing down to the time of loss without notice thereof to the company.[156] Although where the goods insured were at the time of making the application under a sheriff's levy, but had not been taken from the possession of the insured, and there is nothing in the policy to indicate to the assured that such act of the sheriff constitutes an increase of risk, the failure to disclose the same is not a breach which will avoid the

days after the application. It was no fault of the applicant that the policy was not issued immediately after the application was made."

[150] See sec. 1987, herein.

[151] Lang v. Hawkeye Ins. Co., 74 Iowa, 673; 39 N. W. Rep. 86.

[152] Somerset Ins. Co. v. McAudly, 6 Pa. St. 41.

[153] Blooming Grove Mut. F. Ins. Co. v. McAnerney, 102 Pa. St. 335; 48 Am. Rep. 209.

[154] Leonard v. American Ins. Co., 97 Ind. 299; Bowman v. Franklin F. Ins. Co., 40 Md. 620; Egan v. Mut. Ins. Co., 5 Denio (N. Y.), 326.

[155] Hench v. Agricultural Ins. Co. (Pa.), 15 Atl. Rep. 671; Insurance Co. v. Schmidt, 119 Pa. St. 419; 13 Atl. Rep. 317.

[156] Pennsylvania Ins. Co. v. Gottsmann, 48 Pa. St. 151.

contract.[157] In a West Virginia case it is held that a policy of insurance, which provides that it shall be void if the subject of insurance shall be encumbered by judgment or otherwise, is not avoided by a judgment in invitum against the insured before the loss occurs and during the life of the policy.[158]

§ 2020. Encumbrances — Lien — Mechanic's Lien— —Judgment Lien, etc.[159]—A subsisting lien of a mechanic or materialman constitutes an encumbrance on the property insured where the petition has been filed,[160] and where the policy is stipulated to be void if the answers are untrue, and the amount of liens on the property are stated, in answer to inquiries, to be much less than they are in fact, the contract is vitiated.[161] And where from the whole contract taken together it fairly appears that the property is subject to a lien for the purchase money in favor of the vendor, it will be so construed, although single answers may, taken by themselves, not show the encumbrance.[162] So where a vessel is warranted free from all liens, the policy being effected on account of A, loss payable to B, and the latter held a mortgage of the ship subject to other mortgages, there is a breach of warranty for A's interest.[163] The fact that the existence of a former policy and the lien created thereby is not disclosed will not, as a matter of law, vitiate the contract where it appears that the policy was declared void by reason of an increase of risk, such increase of risk having occurred prior to the issue of the second policy.[164] An illegal assessment upon spirits produced in a distillery and the seizure of the insured property is not such a lien as to vitiate the policy requiring all liens to be disclosed. "Legal process" in the policy means a valid legal process, and the

[157] Niagara etc. Ins. Co. v. Miller, 120 Pa. St. 504; 14 Atl. Rep. 385.

[158] Gerling v. Agricultural Ins. Co., 39 W. Va. 689; 20 S. E. Rep. 691; 24 Ins. L. J. 385.

[159] See sec. 1987, herein.

[160] Redmon v. Phœnix F. Ins. Co., 51 Wis. 292; 37 Am. Rep. 830.

[161] Pennsylvania Ins. Co. v. Gottsman, 48 Pa. St. 151.

[162] Lorillard F. Ins. Co. v. McCullough, 21 Ohio St. 176.

[163] Bidwell v. Northwestern Ins. Co., 19 N. Y. 179.

[164] Jackson v. Farmers' Mut. F. Ins. Co., 5 Gray (Mass.), 52.

invalidity of the assessment may be shown by a collateral attack in such case.[165]

§ **2021. Encumbrance—Lien for Taxes—Delinquent Taxes.**[166]—A statement that the property is unencumbered will avoid the contract where it appears that it has been sold for nonpayment of taxes, the purchaser acquiring thereby a lien for the price paid with interest and costs;[167] nor is the case of the assured aided by the fact that a right of redemption existed in him at the time of effecting the policy, that he had no knowledge of the falsity of the statement, and had no intent to deceive, or that it occurred through mistake.[168] But encumbrances created by law, although they are under the statute a lien on the premises, as in the case of due and unpaid back taxes, are not within a warranty against "encumbrances of all kinds," and a failure to disclose their existence will not avoid the policy; the term "encumbrances" in such case relates to those created only by the act or consent of the parties.[169] And the omission, in the absence of inquiry as to encumbrances, to volunteer a disclosure of the existence of the liens does not invalidate the policy,[170] although it is held that the fact that where there are outstanding certificates of sales of the land for taxes the application, to be safe, should state all the facts relating thereto.[171]

§ **2022. Encumbrances—Mortgage.**[172]—A statement, in answer to an inquiry in an application made by stipulation a part of the policy, but which partially discloses the truth as to the amount of mortgages or the character of the same, and which is calculated to induce the belief that the entire truth has been told concerning the same, when as a fact it has not and

[165] Runkle v. Citizens' Ins. Co., 6 Fed. Rep. 143-48.

[166] See sec. 1987, herein.

[167] Wilbur v. Bowditch etc. Ins. Co., 10 Cush. (Mass.) 446.

[168] Wilbur v. Bowditch etc. Ins. Co., 10 Cush. (Mass.) 446; Cooper v. Farmers' Ins. Co., 50 Pa. St. 299.

[169] Hosford v. Hartford F. Ins. Co., 127 U. S. 404; 8 Supr. Ct. 1202.

[170] Alkan v. New Hampshire Ins. Co., 53 Wis. 136.

[171] Hinman v. Hartford F. Ins. Co., 36 Wis. 189.

[172] See sec. 1987, herein.

there are other mortgages or mortgages to a larger amount than stated, will avoid the policy.[173] And the policy is avoided where there is an existing mortgage on the property, it being represented free from encumbrances, such statement being made a warranty, or if made material by stipulation or specific inquiry, or by express reference made a part thereof.[174] And the rule also obtains where the charter of the company requires encumbrances to be stated, and that otherwise none but fee simple unencumbered property shall be insured.[175] And the contract is avoided by the existence of a mortgage on the part of the property insured where the applicant represents that contract is avoided by the existence of a mortgage on the part of the policy, provides that any concealment of the condition or character of the property will make the policy void.[176] So an unrecorded mortgage is an encumbrance which must be disclosed on inquiry.[177] But in another case where the assured gave his grantor a mortgage back, the latter agreeing to pay off an existing mortgage for a less amount, it was held that the failure to disclose the amount of the lesser mortgage did not vitiate the policy, as he could deduct the amount of said mortgage from that due under the larger one.[178] So if

[173] Smith v. Agricultural Ins. Co., 118 N. Y. 522; 23 N. E. Rep. 883; Bowditch Mut. F. Ins. Co. v. Winslow, 8 Gray (Mass.), 38; 3 Gray (Mass.), 415; Byers v. Farmers' Ins. Co., 35 Ohio St. 606; 35 Am. Rep. 623; Hayward v. New England Mut. F. Ins. Co., 10 Cush. (Mass.) 444; Brown v. People's etc. Ins. Co., 11 Cush. (Mass.) 280; Kibbe v. Hamilton etc. Ins. Co., 11 Gray (Mass.), 163; Treadway v. Hamilton etc. Ins. Co., 29 Conn. 68; Fatis v. Conway Ins. Co., 7 Allen (Mass.), 46; Glade v. Germania F. Ins. Co., 56 Iowa, 400; Marshall v. Columbian etc. Ins. Co., 7 Fost. (27 N. H.) 157.

[174] State Ins. Co. v. Jordan, 24 Neb. 358; 38 N. W. Rep. 839; Gahagan v. Union Mut. F. Ins. Co., 43 N. H. 176; Fitchburg Savings Bank v. Amazon Ins. Co., 125 Mass. 431; Buren v. St. Joseph's County Village Co., 28 Mich. 398; Draper v. Charter Oak F. Ins. Co., 2 Allen (Mass.), 569; Patten v. Merchants' & Farmers' Mut. F. Ins. Co., 38 N. H. 338.

[175] Battles v. York Co. Mut. F. Ins. Co., 41 Me. 208; Addison v. Kentucky Ins. Co., 7 B. Mon. (Ky.) 470; Engrains v. Mutual Assur. Soc., 1 Rob. (Va.) 661; Warner v. Middlesex Mut. Assur. Co., 21 Conn. 444.

[176] Gould v. Mutual F. Ins. Co., 47 Me. 403; 74 Am. Dec. 494.

[177] Hutchins v. Cleveland etc. Ins. Co., 11 Ohio St. 477.

[178] Ring v. Windsor Co. Mut. F. Ins. Co., 54 Vt. 434.

the amount stated as due thereon by mortgage is the amount for which the mortgagees have agreed to hold the insured property liable, they relying upon other property for the balance of the debt, the policy is not avoided, although the whole amount due on the mortgage is not represented.[179] But if the mortgage has been paid, it is not an encumbrance,[180] even though it has not been discharged of record.[181] And an answer stating the principal amount due on the mortgage satisfies a requirement that the amount of the mortgage be stated.[182] In Canada, giving a chattel mortgage is held an encumbrance.[183] It is declared in a Vermont case that failure of the insured to state that he believed property was mortgaged is an omission to state information material to the risk, although the mortgagee had within insured's knowledge previously voluntarily destroyed the note secured by the mortgage, the insured having at the time of the contract of insurance warranted that he had not omitted to state to the company any information material to the risk. At least such failure is evidence from which that fact might be found, and if it was a question of law, the court should direct a verdict for the defendant, or, if it was a question of fact, it should be submitted to the jury with proper instructions.[184]

§ 2023. Encumbrance—Mortgage—Knowledge of Insurer or his Agent.[185]—The knowledge of the insurer or his authorized agent at the time of effecting the policy as to the existence of a mortgage, there being no fraud, will prevent the policy being avoided by the claimed concealment or representation,[186] although it is held that no officer or agent of the

[179] Mutual Mill Ins. Co. v. Gordon, 121 Ill. 366; 12 N. E. Rep. 747.

[180] Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302.

[181] Merrill v. Agricultural Ins. Co., 73 N. Y. 452; 29 Am. Rep. 184; Hawks v. Dodge Co. etc. Ins. Co., 11 Wis. 188.

[182] Hosford v. Germania F. Ins. Co., 127 U. S. 399; 8 Sup. Ct. 1199; 32 L. Ed. 196.

[183] Citizens' Ins. Co. v. Salterio, 23 Sup. Ct. Rep. (Can.) 155.

[184] Smith v. Niagara F. Ins. Co., 60 Vt. 682; 6 Am. St. Rep. 144.

[185] See sec. 1987, herein.

[186] Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Bidwell v. North Western Ins. Co., 24 N. Y. 302; Southern Mut.

company can waive the provisions of the charter in matters of this character.[187]

§ 2024. Encumbrance—Mortgage Obtained by Fraud. A mortgage which is obtained by fraud has not such a valid legal existence as to constitute an encumbrance and avoid the policy by reason of its nondisclosure.[188]

§ 2025. Encumbrance Pending Litigation.—Pending litigation affecting the property insured does not by its nondisclosure vitiate the policy.[189]

§ 2026. Interest and Title—No Disclosure Necessary Where no Inquiry.[190]—The assured is not obligated, as a rule, to disclose the exact state of his title to or in the property in the absence of inquiry or of some stipulation in the policy or charter provision requiring it.[191] And where the fact was not disclosed that the building stood on land of another under a verbal agreement terminable at six months' notice, and no inquiry was made as to the title, it was held no material concealment.[192] Where no inquiry is made as to the title,

Ins. Co. v. Yates, 28 Gratt. (Va.) 585; Owen v. Farmers' Joint Stock Ins. Co., 57 Barb. (N. Y.) 518; 10 Abb. Pr., N. S., (N. Y.) 166 n. Anson v. Winnesheik Ins. Co., 23 Iowa, 84.

[187] Leonard v. American Ins. Co., 97 Ind. 299; Murphy v. People's Equitable Mut. F. Ins. Co., 7 Allen (Mass.). 239.

[188] Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302.

[189] Hill v. Lafayette Ins. Co., 2 Mich. 476. Here it was not shown that there had been any question by the insured in the application in regard to pending litigation, and the court said: "We are persuaded that in many cases litigation in which the property is at the time involved might present a temptation to the insured to burn it, and yet . . . . we should admit the validity of this as a defense with much hesitation since it would operate as a snare to the assured. If it is true that litigation increases the risk, why, among the many questions asked the insured, was this not included? If litigation increased the insurer's risk, it should not be left for him to take advantage of it as they might see proper under the general obligation imposed by the law, but they should make it a subject of distinct inquiry of the insured." See sec. 2045, post.

[190] See sec. 1987, herein.

[191] Morrison v. Tennessee M. & F. Ins. Co., 18 Mo. 262; Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40.

[192] Fletcher v. Commonwealth Ins. Co., 18 Pick. (Mass.) 419.

but questions are asked as to the encumbrances, and the policy stipulates that it shall be void "unless the true title of the assured be expressed in his application," and the questions and answers as to encumbrances fully apprise the assurer that the assured is not the absolute owner in fee simple, the stipulation is complied with.[193]

§ 2027. Interest and Title—Generally.[194]—A stipulation in the policy requiring that anything less than an absolute ownership in the property or a title in fee simple to the land on which the building stands must be expressed in the policy is valid and binding upon the assured, there being no fraud, and this is so even though the assured is ignorant of the existence of such a clause, and notwithstanding the fact that he does not consider it essential.[195] And a false statement as to the ownership of the property made in the application will vitiate the contract.[196] In insurances made by mutual insurance companies the title of the assured to the property becomes an important consideration of the contract when that instrument declares that the premium notes shall be a lien upon the real property insured, and a material misrepresentation or concealment in relation to it will avoid the policy.[197] If from the whole application it appears that the assured is not the owner in fee, and it is a part of the policy, the insurance is not void.[198] An insurance company is not bound by the state of record concerning title to the property insured, but may rely upon the representations of the assured with reference thereto.[199] The provision in a fire policy against alienation, by sale or otherwise, of the title of the insured without the knowledge and

[193] Wyman v. People's Equity Ins. Co., 1 Allen (Mass.), 301.

[194] See sec. 1987, herein.

[195] Hartford F. Ins. Co. v. Hass (Ky.), 9 S. W. Rep. 720; Barnard v. National F. Ins. Co., 27 Mo. App. 26.

[196] Mullin v. Mutual F. Ins. Co., 54 Vt. 223; Burn v. Grove District Mut. Ins. Co., 10 U. C. Q. B. 353; Cuthbertson v. North Carolina Home etc. Co., 96 N. C. 480; 2 S. E. Rep. 258; Woolroth v. St. Lawrence Co. Mut. Ins. Co., 10 U. C. Q. B. 525.

[197] Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673.

[198] Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238.

[199] Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673.

consent of the insurer will be enforced in Nebraska when no reason to the contrary is shown to exist, and this applies to a case of false representation as to title to the property.[200] In Iowa, it is held that if goods are sent to a consignee to be returned to the consignor if not sold, but if sold to be paid for by the consignee, the latter may insure such goods, and may recover their full value where the agent who issues the policy knows the consignee's interest in the goods and writes the policy for the purpose of insuring the full value of the consignment, and this though the policy limits the insurer's liability to an amount not exceeding the interest of the applicant.[201]

§ 2028. Interest and Title—Title which will Enable Assured to Transfer by Abandonment—Marine Risk.[202] It is held that the assured under a marine policy should have such a title as will enable him to transfer by abandonment.[203]

§ 2029. Interest and Title—Assignee's Policy.[204]—Where an assignee effects an insurance the company is put on inquiry as to his ownership and the conditions attending the same, and if it neglects to make further inquiry the presumption arises that it is satisfied with the statements made, in the absence of fraud or such material concealment as amounts to deception.[205]

§ 2030. Interest and Title—As Interest may Appear for Account of.—If the property is insured to an amount not exceeding the applicant's interest therein, a stipulation that the insurance shall be void if assured is not the "sole and individual owner" does not vitiate the contract, although the assured is not such owner, if he has truly described his actual

[200] Ehrsam Machine Co. v. Phœnix Ins. Co., 43 Neb. 554; 61 N. W. Rep. 722.

[201] Fox v. Capital City Ins. Co. (Iowa, 1895), 61 N. W. Rep. 211; 24 Ins. L. J. 203.

[202] See sec. 1987, herein.

[203] Locke v. North American Ins. Co., 13 Mass. 61.

[204] See sec. 1987, herein.

[205] Sibley v. Prescott Ins. Co., 57 Mich. 14.

interest in a verbal application.[206] So the clause "as interest may appear" does not necessitate proof of ownership. It is sufficient for the assured, in case of loss, to prove what his interest is, and if he had an insurable interest he may recover, although the policy is conditioned to be void if the assured's interest is not truly stated.[207] The insertion of such a clause operates as a waiver of the specific statement of the interest, and this is so although the policy requires that if the assured is not the sole owner, or if the building stand on leased ground, it must be so expressed.[208] But in another case, where the property was described as "her household furniture," it was held that the clause making the loss payable to others "as their interests may appear" was not inconsistent with the requirement that the interest of the assured must be truly stated if other than the "entire, unconditional, and sole ownership," etc., otherwise the policy would be void, and that said clause was not equivalent to notice of title in others to whom it was so payable, and, therefore, since assured only held under a contract of purchase from them, the title only to become vested on payment of the purchase price, the contract was void.[209] Although if the policy states the insurance to be for account of A, it is equivalent to a representation that A is the owner.[210] And where a policy of marine insurance was effected upon cargo, and it appeared from the letter on which the insurance was predicated, from the inducement thereon, and from a prior application and state of the political world, and the nature of such transactions, that the interests of others than the actual insured were intended to be protected, the words "as interest may appear" will cover the interest of others to the extent thereof, and the fact that the insured represented in the let-

[206] Hoose v. Prescott Ins. Co., 84 Mich. 309; 47 N. W. Rep. 587; 11 L. R. Annot. 340; 32 Cent. L. J. 226.

[207] Dakin v. Liverpool & L. etc. Ins. Co., 77 N. Y. 600.

[208] De Wolf v. Capital City Ins. Co., 16 Hun (N. Y.), 116.

[209] Lasher v. St. Joseph F. & M. Ins. Co., 86 N. Y. 423 (two judges dissenting); Lasher v. Northwestern National Ins. Co., 57 N. Y. 222; 18 How. (N. Y.) 98.

[210] Kemble v. Rhinelander, 3 Johns. C. (N. Y.) 130.

ter itself that he was the owner of the cargo is not such a misrepresentation as will avoid the contract.[211]

§ **2031. Interest and Title—Bill of Sale.**[212]—One is the owner of personal property within a warranty as to title, although he has made a bill of sale thereof, where he has not delivered the same and has taken in return only a promissory note secured by mortgage thereon.[213] And the execution, either prior or subsequent to the issue of the policy, of a bill of sale to a third party on personal property to secure money advanced, the assured retaining possession of the property, is not a breach of a stipulation that "any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured" must be represented to the company and expressed in the policy.[214] One in possession and having legal title to personal property under a conveyance by bill of sale absolute on its face, but in fact as security for debts past due, is, although such bill of sale as between the vendor and vendee is a mortgage, the sole and unconditional owner of such property, within the meaning of a contract exempting the insurer from liability unless the assured is such owner.[215]

§ **2032. Interest and Title—Collateral.**[216]—If the policy stipulates that property held in trust, including that held as collateral, must be insured as such, the assured is under such clause obligated to disclose such interest as comes within the terms, and where the assured received a deed of land, absolute in form, to secure him against loss for liabilities assumed or to be assumed for the grantor, and gives said grantor an agreement in writing to reconvey when he should be indemnified,

[211] Buck v. Chesapeake Ins. Co., 1 Pet. 151.

[212] See sec. 1987, herein.

[213] Vogel v. People's etc. Ins. Co., 9 Gray (Mass.), 23.

[214] Kronk v. Birmingham F. Ins. Co., 91 Pa. St. 300.

[215] Carey v. Liverpool L. & G. Ins. Co. (Wis. 1896), 66 N. W. Rep. 693; citing May on Insurance, secs. 286, 286c; Hubbard v. Insurance Co., 33 Iowa, 325; Johannes v. Fire Office, 70 Wis. 196; 35 N. W. Rep. 298; Insurance Co. v. Dunham, 117 Pa. St. 460; 12 Atl. Rep. 668.

[216] See sec. 1987, herein.

such land is held as collateral security within the meaning of those words so used, and the nature of the interest must be disclosed.[217] Corporation property held by a stockholder as security for advances, and insured by him as his own, constitutes a breach of a stipulation that the interest must be stated if the assured is not the absolute owner.[218] So if property is simply held as collateral security for a debt, such fact will not support findings of absolute ownership under a condition requiring an "entire, unconditional, and sole ownership" for the use and benefit of assured;[219] but one has the "sole and unconditional ownership" of property under an agreement whereby he furnishes another with money to purchase the same, and holds it as security for such advances, although the other party is to bear one-half the expenses of storage, handling insurance, etc., and the profits and losses are to be equally borne.[220]

§ 2033. Interest and Title—Contract of Purchase.—Where the policy provides that it shall be void if the interest of the insured is other than the entire, unconditional, and sole ownership, the fact that the insured has no deed of the land, but holds the same under a contract, and that there is a certain amount due upon the land, is not inconsistent with such provision.[221] In another case the policy provided that it should be void unless the title of the insured were truly stated therein. The application was for insurance, to be issued in the name of the insured, loss payable to plaintiff. It appeared, however, that the property had been purchased of plaintiff by the insured, who gave his notes for some deferred payments. These notes provided that "delivery of said personal property is made to the maker hereof, upon the express condition that the title to the said personal property shall remain in the payees hereof . . . . until this note is paid in full, together with all the

[217] Day v. Charter Oak etc. Ins. Co., 51 Me. 91.

[218] McCormick v. Springfield F. & M. Ins. Co., 66 Cal. 361.

[219] Henning v. Western Assur. Co., 77 Iowa, 319; 42 N. W. Rep. 308.

[220] Welch v. Franklin Ins. Co., 23 W. Va. 288.

[221] Boulden v. Phœnix Ins. Co. (Ala. 1896), 20 S. Rep. 587.

costs of collection." They were not, however, paid at the time of loss, and it was held that the failure of the insured to disclose the true condition of his title amounted to a false representation avoiding the policy.[222] Again, where the policy stipulates that it shall be void "if the subject of insurance be a building on ground not owned by insured in fee simple," an insured vendee of lands under an executory contract of sale who holds a bond for title upon payment of the price, and who has paid a part of the purchase money, is the owner in fee simple of such property within the meaning of the condition of the policy.[223] If the insured states in his application that he owns the property in fee and has a clear title thereto, when in fact his only right therein is under an executory contract of purchase, this is such a misrepresentation as will avoid the policy.[224]

§ **2034. Interest and Title—Conditional Sale.**—An omission to mention a conditional sale of personal property remaining in the vendor's possession is not a breach of covenant to state if the ownership is other than "entire, conditional, and sole ownership";[225] but if the assured holds such property under a conditional sale, the provisions of which are not all complied with, he cannot recover, even though he is described as lessee or bailee, instead of the conditional owner.[226] Although where the conveyance is not void, but merely voidable at the election of the vendor, provided the right to disaffirm is exercised within a reasonable time, the insurer cannot set up a fraud committed on third parties in order to escape its obligations. It is sufficient that the insured is the legal owner and that his title, so far as the insurer is concerned, is not conditional.[227]

[222] Ehrsam Machine Co. v. Phœnix Ins. Co., 43 Neb. 554; 61 N. W. Rep. 622; 24 Ins. L. J. 316.

[223] Loventhal v. Home Ins. Co. (Ala. 1896), 20 S. Rep. 419.

[224] Wooliver v. Boylston Ins. Co., 104 Mich 132; 62 N. W. Rep. 149; 24 Ins. L. J. 793.

[225] Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418; 38 Am. Rep. 687.

[226] Westchester F. Ins. Co. v. Weaver, 70 Md. 539; 17 Atl. Rep. 401.

[227] Phœnix Ins. Co. v. Mitchell, 67 Ill. 43.

§ 2035. Interest and Title—Deed as Related to Title.[228]—A covenant that the title is by warranty deed does not necessarily import that it is a title in fee, since it may pass only an estate for years or a life estate, and where the question was whether the title was a warranty deed or bond, and the answer was "W. D.," it was held that this did not imply that insured had a warranty deed.[229] So the answer "deed" to the question, "What is your title to or interest in the property?" is not a warranty of a grant in fee of a freehold estate, but is consistent with any interest originating in a deed.[230] A stipulation requiring that any interest other than the "entire, unconditional, and sole ownership" of the property must be disclosed avoids the policy, where the ownership is described by the assured as "his frame dwelling-house" and his only title is a quitclaim deed from the second mortgagee of the property.[231] The stipulation as to "sole and unconditional ownership" is not broken by the fact that the deed of the property is not received by the assured until after the fire. The assured is none the less the owner in such case where it appears that the deed was delivered to another to deliver to him.[232] A representation that assured owns the property in fee simple is not falsified by the fact that there is no evidence that a deed or other writing transferring the title was given assured, where there is direct evidence that the land was acquired by trade by one of the assured and another, and that upon dissolution of the partnership the latter's interest had been purchased.[233] An incorrect description in the deed which is subsequently corrected by a quitclaim deed operates as a breach of a stipulation that the policy shall be void if the interest of assured is or shall be "any other or less than a perfect, legal, and equitable title."[234]

[228] See sec. 1987, herein.

[229] Rockford Ins. Co. v. Nelson, 65 Ill. 415.

[230] Merrill v. Agricultural Ins. Co., 73 N. Y. 452; 29 Am. Rep. 184.

[231] Southwick v. Atlantic F. & M. Ins. Co., 133 Mass. 457.

[232] Mattocks v. Des Moines Ins. Co., 74 Iowa, 233; 37 N. W. Rep. 174.

[233] Capital City Ins. Co. v. Caldwell, 95 Ala. 77; 10 S. Rep. 355.

[234] Diehlman v. Dwelling House Ins. Co., 78 Mich. 141; 43 N. W. Rep. 1045.

§ 2036. Interest and Title—Devisee—Charge Created by Will.—If a devisee takes property under a will at a stipulated price from the other heirs, paying therefor in annual installments, it is held a charge created by will upon the land, and an encumbrance upon the property within the meaning of a clause in the policy against encumbrances.[235]

§ 2037. Interest and Title—Dower Right.[236]—An inchoate right of dower may be said to be a title by "deed," the husband's interest having been acquired by deed.[237] And the answer being "fee simple" to a question as to the title, there is no breach of warranty from the fact that a contingent right of dower in the premises exists in the wife of a former owner, who is still alive, and if the application in such case is not a warranty, the policy is not avoided by a nondisclosure of such contingent dower interest.[238]

§ 2038. Interest and Title—Easement in Property—The fact that an adjoining owner has an easement in the insured property does not make the interest other than the "entire, unconditional, and sole ownership." [239]

§ 2039. Interest and Title—Equitable Interest.[240]—A representation of ownership is satisfied where there is an equitable title or estate.[241] Thus, a husband's interest in property bought partly with money advanced by his wife's father satisfies a representation of ownership,[242] but where the condition is that any interest other than the "entire, unconditional ownership" must be represented and expressed in the policy, and the answer to the question is not full and complete, and

[235] So held in Renninger v. Dwelling House Ins. Co., 168 Pa. St. 352; 31 Atl. Rep. 1083.

[236] See sec. 1987, herein.

[237] Dacey v. Agricultural Ins. Co., 21 Hun (N. Y.), 83.

[238] Southern Mut. Ins. Co. v. Kloeber, 31 Gratt. (Va.) 739; Virginia F. & M. Ins. Co. v. Kloeber, 31 Gratt. (Va.) 749.

[239] Connecticut F. Ins. Co. v. Allen, 80 Ala. 571.

[240] See sec. 1987, herein.

[241] Pennebaker v. Tomlinson, 1 Tenn. Ch. 598.

[242] Farmers' Mut. F. Ins. Co. v. Fogleman, 35 Mich. 481.

tends to mislead, and assured has only an equitable interest and possession, the policy is void. The question in this case was, "Is your title to the property absolute?" and assured answered, "My deceased wife held the deed." The application was made a warranty, and it was stated that assured had disclosed all the facts in relation to the property so far as known.[243]

§ **2040. Interest and Title—Fraudulent as Against Creditors.**[244]—The fact that the title in the property is fraudulent and void as against creditors does not constitute a defense of misrepresentation whereby the company may evade liability.[245]

§ **2041. Interest and Title—Homestead.**[246]—If an inquiry as to title is answered "homestead," this is not a warranty of an "absolute title in fee," and will not avoid the policy, although at the time the title was still vested in the government, as the insurer knew.[247]

§ **2042. Interest and Title—Joint Owner—Undivided Interest.**[248]—If a policy of insurance is underwritten on the entirety of a ship, evidence of a sole ownership is held inadmissible to contradict the ship's papers which show a joint ownership, nor may it be proven that they are wrong and founded on mistake.[249] If a policy is effected by one on property as his own, which in fact belongs to him with others, it is such a fraud as avoids the contract.[250] So a statement that his interest is absolute, made by the assured, avoids the policy where the interest is held by himself and his wife under the

[243] Rohrbach v. Germania F. Ins. Co., 62 N. Y. 47; 20 Am. Rep. 451.

[244] See sec. 1987, herein.

[245] Burson v. Fire Assn., 136 Pa. St. 267; 20 Atl. Rep. 401; 26 Week. Not. Cas. 408.

[246] See sec. 1987, herein.

[247] St. Paul F. & M. Ins. Co. v. Neidecken, 6 Dak. 494; 43 N. W. Rep. 696.

[248] See sec. 1987, herein.

[249] Ohl v. Eagle Ins. Co., 4 Mason (C. C.), 172, 390.

[250] Monaghan v. Agricultural F. Ins. Co., 53 Mich. 238.

same deed, and the estate would on his death go to his wife by survivorship; the warranty in this case was that the assured would not omit to state any material fact.[251] And an undivided interest in the property is not an ownership in fee of the land.[252]

§ 2043. Interest and Title—Judgment Creditor—Execution Sale—Foreclosure Sale—Sheriff's Sale.[253]—A judgment creditor to whom the real estate has been set off on execution may truly represent the title as in himself, although the time limited for redemption by the debtor is unexpired.[254] Although it is held in another case that if property has been sold on execution sale under a judgment, the nondisclosure thereof avoids the policy under a requirement that any interest other than the "entire, unconditional, and sole ownership" of property must be expressed in the policy.[255] So the assured is the absolute owner where his title rests upon a certificate of purchase under a foreclosure sale, although the time allowed by law for redemption has not elapsed and the final deed in fee is not received till after the loss. The deed in such case relates back to the date of sale and the certificate, and vests the full legal title from that time, which in this case was anterior to the date of the policy. The condition in the policy was as follows: "If the interest in the property to be insured be a leasehold, trustee, mortgagee, or reversionary interest, or other interest not absolute, it must be represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." [256] Where the company's charter provided for a lien against all buildings insured to the amount of the deposit note, and the insured disclosed the property as his own, when in fact his title was under a tax sale coupled with a foreclosure title, and it appeared that there was an outstanding part interest in the mortgage with which the holder

[251] Ætna Ins. Co. v. Resh, 40 Mich. 241.
[252] Scottish Union etc. Ins. Co. v. Petty, 21 Fla. 399.
[253] See sec. 1987, herein.
[254] Clapp v. Union Ins. Co., 7 Fost. (27 N. H.) 143.
[255] Reaper City Ins. Co. v. Brennan, 58 Ill. 158; 11 Am. Rep. 54.
[256] Gaylor v. Lamar F. Ins. Co., 40 Mo. 13; 93 Am. Dec. 289.

had never parted, the policy was held void.[257] A purchaser at sheriff's sale may truly declare himself to be the owner of the property, although the sheriff's deed has not at the time of such declaration been acknowledged.[258] But the assured has not an "absolute interest" in property where it has been bought by another for a company at a sale under mechanic's lien proceedings, which are void, nor is the assured aided by the fact that the property stands in his name, and that the first purchaser afterward acquires title under an execution sale.[259] Where the insured had recently purchased the property at a judicial sale, and this was known to the insurer when the policy was assigned to the insured, and the sale was afterward confirmed, a clause requiring the assured to have sole and unconditional ownership is not violated.[260]

§ 2044. Interest and Title—Leasehold Interest—Building on Leased Ground.[261]—A warranty of an "entire unconditional, and sole ownership" is not complied with, and the policy is void, where assured is only a lessee or bailee and does not disclose such interest;[262] and so whether the concealment is by design or mistake.[263] But where under a like provision as the above, and the additional condition avoiding the policy in case of any change in title or possession, the fact that the assured had leased the property for a term of years, without stating the same in the policy, does not avoid it.[264] If only a leasehold interest is insured, the provision that the policy shall be void if the insured is not the sole owner of the property does not apply,[265] and where the lessee for a term agreed to

[257] Pinkham v. Morang, 40 Me. 587.

[258] Susquehanna Mut. F. Ins. Co. v. Staats, 102 Pa. St. 529.

[259] Porter v. Ætna Ins. Co., 2 Flip. (C. C.) 100.

[260] Morotock Ins. Co. v. Pankey, 91 Va. 259; 21 S. E. Rep. 487.

[261] See sec. 1987, herein.

[262] Mount Leonard Milling Co. v. Liverpool & L. etc. Ins. Co., 25 Mo. App. 259; Brown v. Commercial F. Ins. Co., 86 Ala. 189; 5 S. Rep. 500; Mutual Assur. Co. v. Mahon, 5 Call (Va.), 517; Mees v. Franklin Ins. Co., 68 Mo. 127.

[263] Mutual Assur. Co. v. Mahon, 5 Call (Va.), 517.

[264] Dolliver v. St. Joseph Ins. Co., 128 Mass. 315; 35 Am. Rep. 378; Insurance Co. v. Haven, 5 Otto (95 U. S.), 242.

[265] Philadelphia Tool Co. v. British American Assur. Co., 132 Pa. St. 236; 25 Week. Not. Cas. 370.

keep the property insured for the lessor's benefit, and described the building as "his," loss payable, if any, to the lessors, it was held that there was no warranty of title, and recovery could be had by the lessors.[266] Although if the assured declares that the title in fee to the land on which the building stands is in him, and it stands on leased ground, the warranty of the truth of the statement is broken,[267] especially so if there is a provision that if the property stands on leased ground it must be so described, otherwise it will not be considered insured.[268] But if the buildings, although standing on leased ground, are the property of insured, and he has a right to remove them at the end of the term, such interest need not be disclosed, as it is not a leasehold interest, under a provision that if the interest be a leasehold or other interest not absolute it must be expressed in the policy.[269] A policy of insurance on a building was conditioned to be void unless "the interest of the assured, whether as owner, lessee, or otherwise, in the property shall be truly stated in the policy." The building was built by the assured upon land leased by them for a term of years, and under a provision that at the expiration of their lease the building should be delivered up to the lessor. The policy described the building as "their two-story brick building, situated on leased land," and in the proof of loss which was sworn to they stated that the building belonged to them, and that no one else had any interest in it. It was held that the policy was not avoided for insufficient description of interest.[270]

§ 2045. Interest and Title—Lien.[271]—An omission to mention a lien is not a breach of a covenant to state if the ownership is other than an "entire, unconditional, and sole ownership";[272] nor under the same covenant is there a breach when the assured is a buyer of goods under a bill of sale re-

[266] Lawrence v. St. Mark's etc. Ins. Co., 43 Barb. (N. Y.) 479.
[267] Cuthbertson v. North Carolina Home Ins. Co., 96 N. C. 480.
[268] Kibbe v. Hamilton Mut. Ins. Co., 11 Gray (Mass.), 163.
[269] Hope Mut. Ins. Co. v. Brolaskey, 35 Pa. St. 282.
[270] Fowle v. Springfield Ins. Co., 122 Mass. 191; 23 Am. Rep. 308.
[271] See sec. 1987, herein.
[272] Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418; 38 Am. Rep. 687.

serving to the seller a lien for a portion of the purchase money.[273] So a condition that any interest in the property insured, "not absolute or less than a perfect title," must be represented and expressed in the policy, is not broken by the existence of a lien for purchase money reserved in the deed of the premises.[274]

§ 2046. Interest and Title—Minor Child's Interest.[275] Where one insures the property as his, and does not disclose the fact that seven-eighths of the land is owned by his minor child, of whom he is the natural tutor, such omission is a breach of the covenant to state if the ownership is other than the "entire, unconditional, and sole ownership" for the use and benefit of assured.[276] Where it was represented that C., the widow of D., was the owner, and the policy was issued to her, loss payable to the mortgagee, and the name was changed, by reason of a mistake, from C. to E., a minor child three years old, without any general guardian, but at the time of making the alteration the same statement as to ownership was made, it was held such a misrepresentation as avoided the policy, notwithstanding a provision therein that it should not be invalidated, as to the mortgagee's interest, by any act of the mortgagor or owner.[277] Where a widow insures property belonging to the minor heirs of her deceased husband, making the application in their behalf, they having no guardian, wherein she states that they own the property in fee simple and that it is unencumbered, the only claim against the property being her dower interest, his knowledge is the knowledge of the company, and binding upon it, and it cannot repudiate the contract after a loss occurs; nor is such policy forfeited by the fact that she subsequently insures her dower interest in the property in another company. In order to assert a forfeiture of an insurance policy on the ground of double insurance, the

[273] Manhattan Ins. Co. v. Baker, 7 Heisk. (Tenn.) 503.

[274] Wooddy v. Old Dominion Ins. Co., 31 Gratt. (Va.) 362; 31 Am. Rep. 732.

[275] See sec. 1987, herein.

[276] Adema v. Lafayette F. Ins. Co., 36 La. Ann. 660.

[277] Graham v. Fireman's Ins. Co., 87 N. Y. 69

second policy must have been made to the same persons mentioned in the first policy, and on the same interest in the same policy.[278]

§ 2047. Interest and Title—Mortgage—Mortgagor and Mortgagee.[279]—As a general rule, a warranty of ownership or of sole, entire, and absolute ownership, or of absolute interest in the property, is not broken by the failure of a mortgagor to mention the fact that an undisclosed mortgage exists, unless there be specific inquiry;[280] nor is a chattel mortgage a breach of a condition that the policy shall be void if the assured is not the "sole and unconditional owner," and does not disclose such fact, although by statute the legal title is in the mortgagee.[281] The stipulation requiring disclosure of any interest other than the "entire, sole, and absolute ownership," and that the same be expressed in the policy, refers to the character and quality of the title, whether that of fee simple or leasehold or otherwise, and not to encumbrances.[282] So the rule applies under such a stipulation as the last although the policy is further conditioned to be void if the interest of the assured is not truly stated.[283] But if the assured has only a mortgagee's interest, it must be disclosed; otherwise, under a stipulation requiring that any other than the "unconditional ownership," etc., must be expressed in the policy, the insurance

[278] Hain v. Ohio Farmers' Ins. Co., 93 Mich. 481; 32 Am. St. Rep. 516.

[279] See sec. 1987, herein.

[280] Woodward v. Republic F. Ins. Co., 32 Hun (N. Y.), 365; Carson v. Jersey City F. Ins. Co., 43 N. J. L. (14 Vroom) 300; 39 Am. Rep. 584; Washington F. Ins. Co. v. Kelly, 32 Md. 421; 3 Am. Rep. 149; Bowman v. Franklin Ins. Co., 40 Md. 620; Clay F. & M. Ins. Co. v. Beck, 43 Md. 358; Ellis v. Insurance Co. of North America (U. S. C. C. Iowa, 1887), 32 Fed. Rep. 646; Dolliver v. St. Joseph F. & M. Ins. Co., 128 Mass. 315; 35 Am. Rep. 378.

[281] Hubbard v. Hartford F. Ins. Co., 33 Iowa, 325; 11 Am. Rep. 125, Miller, J., dissenting. This case denied in Funk v. Minnesota Farmers' Mut. F. Ins. Assn., 29 Minn. 347; 43 Am. Rep. 220.

[282] Ellis v. Insurance Co. of North America (U. S. C. C., Iowa, 1887), 32 Fed. Rep. 646.

[283] Dolliver v. St. Joseph F. & M. Ins. Co., 128 Mass. 315; 35 Am. Rep. 378.

is void.[284] Although, under a like stipulation as to the "entire, unconditional, and sole ownership," it is sufficient that the interest of a mortgagee is insured by calling him "mortgagee."[285] So an applicant for insurance is not bound to disclose the existence of a paid mortgage, or one fraudulently obtained.[286] So it is held that the existence of a mortgage must be disclosed where a stipulation in the policy requires the assured to truly state his interest, if he is not the sole and unconditional owner, or if his interest is that of owner, trustee, agent, mortgagee, or lessee, and also warrants that the assured has not omitted to state any information material to the risk.[287]

§ 2048. Interest and Title—Ownership—Property.[288] Where the validity of insurance is made to depend upon the assured being the absolute and unconditional owner of the true title to the property insured, a failure to set forth the true title with substantial accuracy renders the policy void not only as to the property, the title to which is not truly represented, but as to all other property covered by the same policy and subject to the same risk; and this even though the owner had no intention to deceive.[289] A condition avoiding a policy "if the interest of the insured be other than an absolute fee simple" means only that he shall not have a limited interest, but shall claim and hold under a conveyance purporting to invest him with an estate in fee; but an applicant for insurance is not called upon to settle questions of title with very great precision, and the fact that there is a naked legal title outstanding will not avoid the policy if the assured is the

[284] Waller v. Northern Assur. Co., 64 Iowa, 101.

[285] Williams v. Roger Williams Ins. Co., 107 Mass. 377; 9 Am. Rep. 41. See Wyman v. People's etc. Ins. Co., 1 Allen (Mass.), 301.

[286] Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302; 25 Am. Rep. 386.

[287] Westchester F. Ins. Co. v. Weaver, 70 Md. 536; 17 Atl. Rep. 401 (two judges dissenting). As will be noted, however, this case not only departs from the general rule, but the fact that the word "mortgagor" is omitted from the clause providing who shall disclose their interest ought to have some weight.

[288] See sec. 1987, herein.

[289] Geiss v. Franklin Ins. Co., 123 Ind. 172; 18 Am. St. Rep. 324.

entire beneficial owner of the premises.[290] A condition "if the interest of the assured be other than the unconditional and sole ownership" relates to the ownership at the date of the policy, and not at the date of the fire.[291] In a California decision a representation of absolute ownership in property which is not true prevents recovery on the policy, where it is conditioned therein that any interest not absolute must be represented as such.[292] Where an application for insurance is oral, and no inquiries are made by the agent of the insurer as to the condition of the title to the property, and the insured says nothing about the existence of a mortgage thereon, but does not keep silent from any sinister motive with the intention on his part to deceive or mislead the insurer, then the fact that when the policy was issued there existed a mortgage upon the insured property will not invalidate the policy, notwithstanding the fact that the policy provided that it should be void if there existed any encumbrance, by mortgage or otherwise, against the insured property.[293] Again, it is held that the clause avoiding the policy if the "interest of the assured in the policy" is not truly stated, must be construed as referring to the substantial ownership, and not the bare legal title.[294] A person in whom the entire legal title in property is vested at the time an insurance thereon is effected is the sole and unconditional owner thereof within the meaning of the policy, notwithstanding the insured had made a lease or bill of sale of the property, reserving title until full payment of the consideration, and the insurer has no standing to assert that the transaction was a legal fraud. The insured may recover from the company the full amount named in the policy upon the destruction of the property by fire, although the lessee had partly paid therefor, as such payment does not transfer to him the title pro tanto.[295] In an action upon a policy

[290] Phœnix Ins. Co. v. Bowdre, 67 Miss. 620; 19 Am. St. Rep. 326.

[291] Collins v. London Assur. Co., 165 Pa. St. 298; 30 Atl. Rep. 924.

[292] McCormick v. Orient Ins. Co., 86 Cal. 260.

[293] Hanover F. Ins. Co. v. Bohn (Neb. 1896), 67 N. W. Rep. 777; Morotoch Ins. Co. v. Rodefer (Va. 1896), 24 S. E. Rep. 393.

[294] De Armand v. Home Ins. Co., 28 Fed. Rep. 603.

[295] Burson v. Fire Assn., 136 Pa. St. 267; 20 Am. St. Rep. 219.

of insurance, where it appeared that the policy was issued upon the representation that the owner of the goods was a business man, who personally conducted the business, when in fact the property belonged to a woman, who exercised no personal supervision over the business, it was held that the policy was void.[296] So if the assured describes the property as "my house," he does not thereby warrant his title to the realty to be an unencumbered fee simple title.[297] The assured has an "entire, unconditional, and sole ownership," within the conditions in a policy, although the possession of the realty on which the building and insured property are situate is held by him under an agreement for its purchase, and the balance due thereon is unpaid at the time the policy is issued, said policy being held by the agent until the land is paid for, and the deed given the plaintiff, after which the loss occurs.[298] In a case which arose in Minnesota the purchaser of a horse who had given his notes for one thousand dollars, the purchase price, and had secured the vendor by a chattel mortgage, effected an insurance for five hundred dollars upon the horse, "loss payable to the vendor as his interest might appear." The contract of purchase provided that if the horse died within a certain time, the vendor should take the five hundred dollars and give up the notes. It was held in an action on the policy that this was not a breach of the warranty in the policy; that the vendee was the "sole, absolute, and unconditional owner" of the horse.[299] Though the property insured may at the time insurance is effected thereon be mortgaged, yet the interest of the mortgagor is an "unconditional and sole ownership."[300] But all the cargo put on board the ship on which the policy is to attach is included in the warranty; it is understood that the assured are owners of the cargo, but the valuation of freight and profits thereby agreed to will be binding, whether the

[296] Freedman v. Fire Assn. of Philadelphia, 168 Pa. St. 249; 32 Atl. Rep. 39.

[297] Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673.

[298] Johannes v. Standard F. Office, 70 Wis. 196; 5 Am. St. Rep. 159.

[299] Kells v. Northwestern L. Ins. Co. (Minn. 1896), 67 N. W. Rep. 215.

[300] Morotoch Ins. Co. v. Rodefer (Va. 1896), 24 S. E. Rep. 93.

lading of the vessel is the property of the assured or of others, or whether at the time of the loss there shall be any cargo on board or not.[301] In an Alabama case a fire policy was held avoided by the assured stating that his title in certain hay was absolute and undivided, when others were interested to the extent that they were to perform certain services upon it and participate in the proceeds.[302]

§ 2049. Interest and Title—Partnership Interest—Exclusive Ownership.[303]—There is a certain class of words which although they may seem to imply the assertion by the assured of an exclusive ownership, nevertheless they are only intended to describe the property, rather than to stipulate concerning the assured's interest. Of this character are the words "his stock of tobacco," which are not falsified by the fact that assured has only a partnership interest.[304] The fact that the assured insures his property under a firm name does not, in the absence of fraud or deceit, violate a requirement of the policy that the assured's interest must be truly stated.[305] Where goods are insured and the assured's interest in the storehouse containing them is indirectly described as belonging to the firm, when it is the property of one of its members, it does not avoid the contract in the absence of fraud.[306] The assured is the sole owner within the meaning of those words where the stock insured is purchased and replenished from his individual funds, although the business is conducted under a firm name of A & Bro., and it appears that assured's brother conducted the business, receiving for his services one-half the net profits, and that he is responsible for one-half the losses from bad debts, and the proofs of loss show that the property belongs to A and B, doing business under the said name and style;[307] although a covenant requiring that any interest other than the "entire, unconditional, and sole ownership"

[301] Bayard v. Massachusetts F. & M. Ins. Co., 4 Mason (C. C.), 256.

[302] Capital City Ins. Co. v. Autrey (Ala. 1895), 17 S. Rep. 326.

[303] See sec. 1987, herein.

[304] Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684.

[305] Clark v. German Mut. F. Ins. Co., 7 Mo. App. 77.

[306] Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9.

[307] Pittsburgh Ins. Co. v. Frazee, 107 Pa. St. 521.

must be expressed in the policy is not complied with, and assured is not the sole owner, by reason of the fact that he is the surviving partner, and has paid out more in the settlement of the firm and individual indebtedness and attendant expenses than the amount of the deceased partner's interest, and more than the firm's indebtedness to the latter's estate.[308] Nor is a like clause complied with where the partnership insures property as theirs which, although put in as part of the firm's capital, has never been conveyed to it, nor to any person in trust for it; such a policy is void ab initio not only as to the insured, but also as to an assignee, although the insurer has consented to an assignment, for such consent gives no force or validity to a policy in the assignor's hands.[309] The assured's ownership of property insured in his name is not for the "use and benefit" of another, so as to avoid the contract, where such other is to have one-fourth the net profits from the sale of said property on consideration that he give his time to the business of buying and selling the same, and in which he is interested with the assured.[310]

§ 2050. Interest and Title—Pending Litigation.[311]—The insured is none the less the "sole and undisputed owner" of the property by reason of the fact that an action is pending by a judgment creditor of a former owner to enforce judgment against the property, the assured's ownership not being thereby disputed under any allegation in said action.[312]

§ 2051. Interest and Title—Possession.[313]—If one is in possession of the premises, and has an interest therein, a description of the same as "his two buildings" does not constitute a warranty of ownership nor a material misrepresentation; such a description sufficiently indicates the property to be insured.[314] So it is prima facie evidence of title in fee

[308] Crescent Ins. Co. v. Camp, 71 Tex. 503; 9 S. W. Rep. 473.

[309] Citizens' F. Ins. Co. v. Doll, 35 Md. 89; 6 Am. Rep. 360.

[310] Boutelle v. Westchester F. Ins. Co., 51 Vt. 4.

[311] See sec. 1987, herein.

[312] Lang v. Hawkeye Ins. Co., 74 Iowa, 673; 39 N. W. Rep. 86. See sec. 1433, herein.

[313] See sec. 1987, herein.

[314] Rohrbach v. Germania F. Ins. Co., 62 N. Y. 47; 20 Am. Rep. 451.

that assured is in possession, claiming and occupying as owner.[315] If the assured has a freehold in the land, and the exclusive right of occupation and disposal of the house, a representation that it is his own is not a misrepresentation avoiding the policy, in the absence of an intent to deceive, there being no overestimate of the value of the house.[316] So where the property insured was two storehouses and a stock of goods, possession was held prima facie evidence of title.[317]

§ 2052. Interest and Title — Trust Deed — Parol Trust.[318]—The condition requiring that any interest other than the "entire, unconditional, and sole ownership" of the property, etc., must be expressed in the policy is not a warranty against liens and encumbrances, and is not broken by the fact that the assured has given a deed of trust of the property to secure a debt, and has not disclosed the same, nor is the cestui que trust a joint owner.[319] But a deed of trust must be disclosed under a charter provision that the policy will be void if any encumbrance on the premises is not stated.[320] Nor is a statement that assured's title is a warranty deed falsified by the fact that the land is charged with a parol trust, even if it could be enforced, such statement being in fact literally true and responsive to the inquiry made.[321] And if the assured is the absolute owner, a dry trust in another of the legal title will not avoid the policy.[322]

§ 2053. Interest and Title—In Trust or on Commission.[323]—All property in which the assured has a qualified

[315] Franklin F. Ins. Co. v. Chicago Ice Co., 36 Md. 102; 1 Phillips on Evidence, 646, n.

[316] Curry v. Commonwealth Ins. Co., 10 Pick. 535; 20 Am. Rep. 547.

[317] Kansas Ins. Co. v. Bury, 8 Kan. 159.

[318] See sec. 1987, herein.

[319] Manhattan F. Ins. Co. v. Wall, 28 Gratt. (Va.) 389; 26 Am. Dec. 364; Quaerter v. Peabody Ins. Co., 10 W. Va. 507; 27 Am. Rep. 582.

[320] Lochner v. Home Mut. Ins. Co., 17 Mo. 247; 19 Mo. 628.

[321] Pavey v. American Ins. Co., 56 Wis. 221.

[322] Watertown F. Ins. Co. v. Simons, 96 Pa. St. 520.

[323] See sec. 1987, herein.

interest by possession, the ownership being in a third person, is within the meaning of a provision requiring that property held in trust or on commission must be insured as such.[324] And where the assured owns property in common with others, and insures it as "his own or held in trust for others," the property is covered, notwithstanding the provision that any interest is not covered of which assured is not the "sole, absolute, and unconditional owner," for this provision is not applicable to such a case;[325] but property put into another's hand to defraud creditors is not held in trust or on commission.[326]

§ **2054. Interest and Title—Stored Property.**[327]—If the policy requires that "sole ownership" shall be expressed in the policy, and the reference is to the goods as stored in a certain warehouse and also that "said goods are not the property of assured," the policy is void.[328]

§ **2055. Interest and Title—Tenant by the Curtesy—Joint Occupancy.**[329]—If one describes himself as owner of the property, and his estate is only that of tenant by the curtesy, the contract will be void, under a stipulation that an estate less than that of fee simple must be expressed in the policy.[330] A married woman holding the fee to land on which the building insured stands, said title having been acquired before coverture, has an "absolute ownership" within the intent of the policy, although her husband is entitled to a joint occupancy and a contingent estate therein by the curtesy, and she need not disclose the existence of the marriage relation.[331]

§ **2056. Interest and Title—Tenant for Life—Tenant in Tail.**[332]—One who holds only a life estate is not

[324] Turner v. Stetts, 28 Ala. 420.
[325] Grandin v. Rochester German Ins. Co., 107 Pa. St. 26.
[326] Ayers v. Hartford etc. Ins. Co., 17 Iowa, 176.
[327] See sec. 1987, herein.
[328] Fuller v. Phœnix Ins. Co., 61 Iowa, 350.
[329] See sec. 1987, herein.
[330] Leathers v. Farmers' Mut. F. Ins. Co., 24 N. H. 259.
[331] Commercial Ins. Co. v. Spankneble, 52 Ill. 53; 4 Am. Rep. 582. The tenancy was acquired before the act of 1861.
[332] See sec. 1987, herein.

the "sole and undisputed owner" of the land and property,[333] nor has he an "absolute interest," [334] nor an "absolute and sole ownership," [335] and a tenant in tail may represent the land as his property.[336]

§ 2057. Interest and Title—United Interests of Assured.[337]—Where the policy requires that the title of assured be expressed in the policy, if it is a leasehold or that of mortgage, or any other interest not in fee simple, or not absolute, in case of personal property such stipulation is held to refer to cases where the united interests of assured are less than absolute.[338]

§ 2058. Interest and Title—Vendee under Contract for Purchase.—Bond for Deed.—A vendee in possession under a contract of purchase is the real owner within the meaning of the condition as to the "entire, unconditional, and sole ownership" of the insured property,[339] especially where he has paid part of the purchase price, the remainder being paid

[333] Garver v. Hawkeye Ins. Co., 69 Iowa, 202 (one judge dissenting.)

[334] Davis v. Iowa State Ins. Co., 67 Iowa, 494.

[335] Collins v. St. Paul F. & M. Ins. Co., 44 Minn. 440; 46 N. W. Rep. 906. But see Kenton Ins. Co. v. Wigginton, 89 Ky. 330; 12 S. W. Rep. 668; 7 L. R. Annot. 81.

[336] Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535.

[337] See sec. 1987, herein.

[338] Rankin v. Andes Ins. Co., 47 Vt. 145.

[339] Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 30 Am. Dec. 90; Johannes v. Standard F. Office, 70 Wis. 196; 35 N. W. Rep. 298; Dupreau v. Hibernia Ins. Co., 76 Mich. 615; 43 N. W. Rep. 585; Strong v. Massachusetts Ins. Co., 10 Pick. (Mass.) 40; Martin v. State Ins. Co. of J. C., 44 N. J. L. 273; Martin v. State Ins. Co. of J. C., 44 N. J. L. 485; Niblo v. North American Ins. Co., 1 Sandf. (N. Y.) 551; Davis v. Quincey Mut. F. Ins. Co., 10 Allen (Mass.), 113; Laidlow v. Liverpool etc. Ins. Co., 13 Grant (U. C.), 377; Dolen v. Farmers' etc Ins. Co., 5 Lans. (N. Y.) 275; Rumsey v. Phœnix Ins. Co., 1 Fed. Rep. 396; 2 Fed. Rep. 429. In this case the court says: "There is no misrepresentation, because an intent to deceive cannot be inferred. There is no breach of warranty because the representation is true in substance. . . . . He communicated all that was material to the risk, and was not bound to specify the precise extent or nature of his interest": Rumsey case, ante. Such vendee is the equitable owner.

after the issuance of the policy, but before its delivery to him, and the improvements on the land are of greater value than the amount of insurance, and no specific inquiries are made.[340] And a description of the house as "my house" is sufficient where the applicant is in possession under a valid contract to purchase, and has paid part of the purchase money.[341] And so though the property is held under a parol agreement for purchase at a fixed price, and valuable improvements have been made.[342] And if the vendee has paid the full purchase price, but has not yet received the deed, he is an "unconditional owner," [343] and one who is in any condition to enforce specific performance of such contract of purchase may represent himself as owner in fee simple.[344] If specific questions are put calculated to obtain information as to the nature of assured's interest, and from all the answers of the application taken together it appears that assured holds under such a contract of purchase, and so holds the equitable title in fee with a right to enforce a conveyance, there is no misrepresentation or breach of warranty as to ownership. Thus: Question. "Is the property owned and operated by the applicant"? Answer "Yes." Question. "Is any other person interested in the property"? Answer. "No." Question. "Encumbrance, is there any on the property"? Answer. "Held by contract." These answers were declared to be substantially true, and the policy was held not avoided for false representations.[345] Notwithstanding the above decision, it is held that one who occupies under articles of agreement to purchase and has no deed must disclose the fact, although he has made a payment under said agreement,[346] and also that an executory

[340] Johannes v. Standard F. Office, 70 Wis. 196; 35 N. W. Rep. 298; Millville Mut. F. Ins. Co. v. Witgens, 88 Pa. St. 107. See Chandler v. Commerce F. Ins. Co., 88 Pa. St. 223.

[341] Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 30 Am. Dec. 90.

[342] Hough v. City Fire Ins. Co., 29 Conn. 10; 76 Am. Dec. 581.

[343] Lewis v. New England F. Ins. Co., 29 Fed. Rep. 496.

[344] East Texas F. Ins. Co. v. Dyches, 56 Tex. 565.

[345] Lorillard F. Ins. Co. v. McCulloch, 21 Ohio St. 176; 8 Am. Rep. 52; Hinman v. Hartford F. Ins. Co., 36 Wis. 159; Sprague v. Holland Purchase Ins. Co., 69 N. Y. 128; McCullock v. Norwood, 58 N. Y. 563; 4 Jones & S. (N. Y.) 180.

[346] Reynolds v. State etc. Ins. Co., 2 Grant Cas. (Pa.) 326.

contract for purchase does not constitute a "sole and unconditional ownership."[347] Where the assured has only a title bond to the property, and payments are due thereon, this is not such a nondisclosure as avoids the contract under a stipulation requiring an "entire, unconditional, and sole ownership," where such fact is in no way material to the risk.[348] And the same is true although it appears that the assured had in fact purchased the title in fee to the land, and held a bond for a conveyance, but his vendor's title was defective as to one-seventh of the remainder after his life estate, and a suit to perfect the title was pending, and there was also an outstanding purchase money note, which, however, assured owned.[349] And the facts that the vendor has executed a bond to convey the premises on performance of certain conditions, and that the obligee has a subsisting equitable right under the bond by reason of a waiver by the vendor of performance, the time of performance having elapsed, constitute an encumbrance or falsification of a statement that the property was the vendor's.[350] Again, one holding only under a bond for a deed and insuring in a mutual company must disclose the fact.[351] And this is true under a stipulation requiring any interest not absolute to be stated.[352]

§ **2059. Interest and Title—Wife's Property.**[353]—Where the fee was in the wife, and the husband insured the property in his name in a mutual company, the contract was declared void, since the insurer could have no lien upon the

[347] Brown v. Commercial F. Ins. Co., 86 Ala. 189; 5 S. Rep. 500; Clay F. & M. Ins. Co. v. Huron Salt etc. Co., 31 Mich. 346; Cuthbertson v. North Carolina Home Ins. Co., 96 N. C. 480; 2 S. E. Rep. 258.

[348] Franklin F. Ins. Co. v. Crockett, 7 Lea (Tenn.), 725.

[349] Williams v. Buffalo German Ins. Co., 17 Fed. Rep. 63.

[350] Newhall v. Union Mut. F. Ins. Co., 52 Me. 180.

[351] Merrill v. Farmers' etc. Ins. Co., 48 Me. 285. See Jenkins v. Quincey etc. Ins. Co., 7 Gray (Mass.), 370; Smith v. Bowditch Mut. F. Ins. Co., 6 Cush. (Mass.) 448; Brown v. Williams, 28 Me. 252.

[352] Ayres v. Home Ins. Co., 21 Iowa, 185 or 193. See Lowell v. Middlesex Mut. F. Ins. Co., 8 Cush. (Mass.) 127, where policy was held avoided.

[353] See sec. 1987, herein.

property;[354] and if the policy is effected by the husband on property belonging to his wife, without disclosing that fact, and the contract is conditioned to be void if the interest of the assured is not stated, the wife cannot recover for a loss, there being no case for reformation for fraud or mistake.[355] It is held, however, that a husband may insure as his own in a stock company a house which he has built and enlarged on land owned by his wife and her sister, and which he occupies in severalty with them.[356]

§ **2060. Intention to Navigate—Marine Risk.**[357]—If a time policy is effected upon a vessel now lying" at a certain place, "intended to navigate" certain waters, there is no warranty that she will navigate the waters specified, and recovery may be had for a loss occurring eleven months after the insurance is taken out, even though the boat has never left the dock.[358]

§ **2061. Insanity—Life Risk.**[359]—One who has received an injury on the head in childhood, resulting in hardening of the brain and a weakening of the mental powers in mature age, continuing and increasing till death, and necessitating confinement in an asylum for quiet and treatment, is not afflicted with insanity, within the meaning of an application for life insurance, it appearing that he knew what was going on, and it not appearing that he was subject to delusions or acted irrationally.[360] Plaintiff's decedent, a canvasser for a life insurance company, under instructions from the president to be cautious and not insure insane persons, subsequently made application for a policy on his own life, stating that there were no circumstances which rendered him peculiarly liable to accident, but omitting to state that he had been previously

[354] Eminence Mut. Ins. Co. v. Jesse, 1 Met. (Ky.) 523.

[355] Diffenbaugh v. Union F. Ins. Co. (Pa. 1892), 24 Atl. Rep. 745; 25 Chic. Leg. News, 22; Solms v. Rutgers etc. Ins. Co., 8 Bosw. (N. Y.) 578.

[356] Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535.

[357] See sec. 1987, herein.

[358] Grant v. Ætna Ins. Co., 15 Moore P. C. C. 516; 8 Jur., N. S., 705.

[359] See sec. 1987, herein.

[360] Newton v. Mutual B. L. Ins. Co., 76 N. Y. 426; 32 Am. Rep. 335.

afflicted with insanity, from which he had apparently been cured. It was held that if he did not conceal any fact which in his own mind was material in making the application, the policy was not void.[361] In Dr. Hamilton's Manual of Medical Jurisprudence[362] he notices a case in which the assured became insane after the policy was effected, but the defense was that the insured at the time of applying for insurance was aware of his malady, and the jury were charged that the concealment was material if the mental disease had a tendency to shorten life.[363] In connection with this case we notice that another eminent authority[364] is of the opinion that insanity has a tendency to shorten life.[365]

§ **2062. Insurance beyond Specified Amount Contrary to Agreement.**—It is held in Pennsylvania that a policy is forfeited by a breach of a covenant not to insure beyond two-thirds of the estimated value of the property.[366]

§ **2063. Iron Safe—Keeping of Books, etc., in.**—A condition in a policy of insurance upon a stock of goods that the books must be kept in an iron safe at night means that they must be so kept during the hours between closing business at night and before opening in the morning. Thus, where it was customary in the line of business in which the insured was engaged to keep open as late as from nine to eleven o'clock at night, and a loss occurred at nine o'clock while the insured was writing up the books, it was held that the insurer was liable, as the condition could not be construed to mean from sunset to sunrise.[367] And the iron-safe clause in an insurance policy, that the assured agrees to keep a set of books showing a record of all business transacted, including purchases and sales for cash and credit, is not complied with where

[361] Mallory v. Travelers' Ins. Co., 47 N. Y. 52; 7 Am. Rep. 410, and note 414.

[362] Ed. 1883, 122.

[363] Reported Annales d' Hygiene Publique, lxxvi, p. 152.

[364] Taylor's Medical Jurisprudence, ed. 1866, 752.

[365] See further as to insanity, sections herein, "Suicide," c. 56.

[366] Mitchell v. Lycoming F. Ins. Co., 51 Pa. St. 402.

[367] Jones v. Southern Ins. Co., 38 Fed. Rep. 19.

the books kept by the assured do not convey any correct or satisfactory idea of the amount of goods on hand and destroyed by the fire, and there is nothing from which the insurers can verify the accounts furnished them and thereby ascertain their accuracy.[368] The object of this clause as to keeping of books of account and inventories is to enable the insurer to arrive more accurately than he would otherwise be able to at the exact amount of the loss. If the insured, having failed to comply with this clause, is, after a loss, required by the company to produce bills and vouchers for all goods which he has received for several years, such action on the part of the company is held to be a waiver.[369] Clauses of this character have been held warranties, and also representations. Thus, where a policy of fire insurance provided that it was accepted subject to such conditions as might be "indorsed thereon or added thereto," and a slip pasted on the policy, stating the amount of insurance, provided that the policy was "subject to iron-safe clause . . . . attached," and such clause was attached to the policy on another slip requiring the insured to keep certain books, as to his business, secure from fire, to be subject to inspection of insurer in case of loss, and providing that if the insured should fail to produce them the policy should be void, it was held that compliance with the iron-safe clause was necessary to recovery, since it was a warranty on the part of the insured.[370] But in Texas, where a piece of paper pasted to the policy contained a requirement that the assured should keep a record of sales "warranted to be kept in an iron safe at night," it was held a representation, and not a warranty.[371] In another case in the same state, however, the "iron-safe clause" has been held a warranty, the breach of which will avoid the policy.[372] In a federal case it is held that substantial compliance is sufficient under the "iron-safe clause" requiring a set of books and an inventory to be se-

[368] Pelican Ins. Co. v. Wilkinson, 53 Ark. 353; 13 S. W. Rep. 1103.

[369] Brown v. State Ins. Co., 74 Iowa, 428; 38 N. W. Rep. 135.

[370] Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co., 8 Tex. Ct. App. 227; 28 S. W. Rep. 1027.

[371] Goddard v. East Texas F. Ins. Co., 67 Tex. 69.

[372] Standard F. Ins. Co. v. Willock (Tex. Ct. Civ. App. 1894), 29 S. W. Rep. 218.

curely locked in a fireproof safe at night and at all times when the store is not actually open for business, or in some secure place, and that in case of loss assured will produce said books and inventory; such a clause is a condition subsequent only, and a literal, exact fulfillment is unnecessary.[373] This decision certainly seems more in accord with the actual intent of the parties, and with the justice and reason of the law, and with the tendency of the decisions, than a construction requiring an exact and literal compliance. Where the policy contains an "iron-safe clause," which requires the insured to keep a set of books, which shall include the sales, purchases, and last inventory taken, and in fact a general record of the business, such clause is complied with where the insured keeps an inventory taken at the time of effecting the insurance and a set of books commencing at that date.[374]

§ 2064. Iron Safe—Keeping Books, etc., in—Waiver. The "iron-safe clause" in a policy may be waived the same as other conditions. Thus, there is a waiver where an agent of the insurer after the fire receives the account books of the insured with knowledge of the fact that the books were not in the safe at the time of the fire, and states to the insured at the time the books are delivered to him that it is "all right."[375] So if a company has knowledge that the insured has broken a condition in the policy requiring him to keep his books and invoices so as to protect them from fire, and that the books are burned in consequence, it waives the forfeiture if it requires the insured to furnish it with copies of such books and invoices for their examination, and induces him to incur labor and expense in procuring them.[376]

[373] Western Assur. Co. v. Redding, 15 U. S. C. C. A. 619; 68 Fed. Rep. 708, Pardee, C. J., dissenting in a well-considered opinion.

[374] Liverpool & L. & G. Ins. Co. v. Sheffy, 71 Miss. 919; 16 S. Rep. 307.

[375] Curnow v. Phœnix Ins. Co. (S. Car. 1896), 24 S. E. Rep. 74. See, also, Brown v. State Ins. Co., 74 Iowa, 428; 38 N. W. Rep. 135, noted above under preceding section.

[376] Brown v. State Ins. Co., 74 Iowa, 428; 7 Am. St. Rep. 495.

§ 2065. Iron Shutters—Fire Risk.[377]—The fact that the building insured is described as being fitted with iron shutters and doors does not insinuate that they shall be kept closed at any particular time. It is sufficient if it has such shutters and doors, and the insured is not relieved of responsibility because they are open and the fire is carried through them.[378]

§ 2066. Lading—Dunnage — Registered Tonnage — Marine Risk.[379]—If the ship is warranted not to hold more than her registered tonnage, this will be construed to refer to her cargo, and not to necessary and proper dunnage. In such case coal may constitute a suitable article for dunnage if it is used as such in good faith, and in no greater amount than necessary; nor is there a breach of warranty, even though a freight is received for its carriage.[380] A warranty that a vessel shall not load more than her registered tonnage refers to her carrying capacity as evidenced by the ship's register under which she is sailing at the date of the policy, and if she sails under a foreign registry, the acts of Congress as to measurement do not apply.[381]

§ 2067. Lights—Fire Risk.[382]—The fact that one open kerosene lamp is used in the office of a mill which is insured does not falsify a statement that no open lights are used in the mill, such lamp not being in the mill properly so called.[383]

[377] See sec. 1987, herein.

[378] Scott v. Quebec F. Assur. Co., 1 Stu. (L. C.) 147.

[379] See sec. 1987, herein.

[380] Thwing v. Great Western Ins. Co., 103 Mass. 401; 4 Am. Rep. 567. In this case the court said: "Coal was shown to be a suitable and proper article to be used for dunnage, it was so used in good faith, and at least as much as the excess above the registered tonnage was reasonably necessary for the dunnage of the ship on this voyage. The mere fact that a freight was paid upon the coal found to have been so used is not necessarily inconsistent with, and cannot control, the finding of the jury: Great Western Ins. Co. v. Thwing, 1 Low, 444.

[381] Reck v. Phœnix Ins. Co., 130 N. Y. 160; 29 N. E. Rep. 137; 41 N. Y. St. Rep. 250; 45 Alb. L. J. 155.

[382] See sec. 1987, herein.

[383] Insurance Co. of North America v. McDowell, 50 Ill. 120.

§ 2068. Location.[384]—It is said in a Rhode Island case that "there seems to be no doubt that . . . . it must be taken as the general rule that all the material statements of the policy of insurance, including statements as to the place in which the insured property is situate, are warranties, and that such warranties must be true, and must continue to be true during the whole life of the policy, as the condition of any recovery thereunder." [385] But some consideration must be given to the nature of the property insured and the uses contemplated; so reference must be had to the voluntary acts of the assured—in fact, all the material circumstances should be considered.[386] This is illustrated by the case where a tank containing oil was carried by a flood four or five hundred feet from its location as set forth in the policy, although it still remained on the assured's premises, and the court held the fact of location to be descriptive only, and if a warranty, then not a continuing one, and if the latter, then at most it was only a warranty against a voluntary change of the tank's location. One of the grounds of this decision was that in case of doubt a construction in favor of assured will be adopted.[387]

§ 2069. Master's Certificate — Warranty — Marine Risk.[388]—A warranty "that the vessel must be commanded by a captain holding a certificate from the American Shipmasters' Association" means a valid and subsisting certificate.[389]

§ 2070. Medical Attendant—Medical Treatment—Life Risk.[390]—If specific inquiries are made whether the as-

[384] See sec. 1987, herein.

[385] Lyon v. Providence-Washington Ins. Co., 14 R. I. 110, per Carpenter, J.; citing Eddy Street Iron Foundry v. Hampden Stock & Mut. Ins. Co., 1 Cliff. (C. C.), 300; Shertzer v. Mutual F. Ins. Co., 46 Md. 506; Wall v. East River Mut. Ins. Co., 3 Seld. (N. Y.) 370; Hartford F. Ins. Co. v. Ferrish, 73 Ill. 166; Harris v. Royal Canadian Ins. Co., 53 Iowa, 236.

[386] See sec. 1742-50, herein.

[387] Western & A. Pipe Lines v. Home Ins. Co., 145 Pa. St. 346; 21 Ins. L. J. 24; 22 Atl. Rep. 665. See, also, secs. 220 et seq. herein; Soto v. Farmers' Mut. Ins. Co. v. Manchester (Minn. 1892), 52 N. W. Rep. 979; Meadowcraft v. Standard etc. Ins. Co., 61 Pa. St. 91.

[388] See sec. 1987, herein.

[389] McLoon v. Comercial Ins. Co., 100 Mass. 472; 1 Am. Rep. 129.

[390] See sec. 1987, herein.

sured has medical attendance within a stated period of time, the fact is thereby made material, and must be disclosed.[391] If the name of the family physician is required, this term will include a physician who is consulted professionally by members of the family, and who usually attends assured's wife and children.[392] And where the inquiry was made, "How often has medical attendance been required"? and the answer was, "Two years ago," and the name of the medical attendant being asked, assured gave the name of Dr. R., who had in fact attended him about a year before, but the assured did not disclose the fact that he had had a relapse shortly thereafter, when he was attended by Dr. C., and that three physicians in attendance had despaired of his life; such information was found immaterial by the jury, and no intentional fraud existed; nevertheless the policy was declared void.[393] So it is held that the statement by assured that he has not been prescribed for by a physician is falsified by the fact that a physician has prescribed for a cold.[394] This decision is cited with approval in a Massachusetts case, where a benefit certificate was issued to the assured and he warranted the answers to the questions to be full, complete, and true, and that the answers and application should form the basis of the contract, and that if any misrepresentations or fraudulent or untrue answers were made the policy would be void. The assured was asked whether he had "personally consulted a physician, been prescribed for, or professionally treated within the past ten years," to which he answered "No," which answer the jury found to be false, the court having instructed them that if the assured being, as he supposed, in need of a physician, went to one for the purpose of consulting him as to what was the matter with him, had an interview, answering such inquiries as the physician deemed pertinent, receiving aid, advice, or

[391] United Brethren Mut. Aid Soc. v. O'Hara, 120 Pa. St. 256; 12 Cent. Rep. 682. See O'Hara v. United Brethren Mut. Aid Soc., 134 Pa. St. 417.

[392] Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497.

[393] Cazenove v. British Equitable Assur. Co., 29 L. J. C. P. 160; affirming 28 L. J. C. P. 259; 6 Com. B., N. S., 437.

[394] Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587; 9 Atl. Rep. 766.

assistance from him, assured "consulted" a physician within the meaning of the interrogatory, and also that if they found that he went to a physician for the purpose of procuring aid and assistance from the physician as such, and the physician prescribed a remedy or treated him professionally, either by giving him a prescription or by administering hypodermic injections of morphine, of which there was some evidence, then he was professionally "treated" within the meaning of the interrogatory, or professionally "prescribed for," and the court of appeals declared this charge to be correct, as also the following definition of a "prescription": "If the insured went to a physician for the purpose of getting his aid, advice, or assistance as a physician in a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician hearing what the assured had to say, as a physician, and for the purpose of relief or cure, or aid, or assistance, gave to the insured medicine, then he prescribed for him."[395] In another Massachusetts case it is held that if the application asks, "By what physician were you last attended"? the applicant is held to have been attended by a physician, within the meaning of that question, where it appears that he had called upon a physician and submitted to an examination by him, and had subsequently again called upon the same physician and consulted him professionally.[396] In another case, however, where the name of the physician who last attended was asked, it was held that this must be construed to mean an attendance for some disease of importance, and not a mere temporary indisposition.[397] So where the question is whether the assured has employed or consulted individually a physician, this is held not to refer to a consultation made at any time during the applicant's life, but to an employment or consultation with reference to the application for insurance, so that proof of employment of a physician six months or a year and a half prior thereto need not be disclosed in answer to

[395] Cobb v. Mutual B. Assn., 153 Mass. 176, per Devens, J.

[396] White v. Providence Savings L. Assur. Soc., 163 Mass. 108; 39 N. E. Rep. 771; 27 L. R. Annot. 398.

[397] Brown v. Metropolitan L. Ins. Co., 65 Mich. 306; 32 N. W. Rep. 610.

such a question.[398] If the inquiry is as to the last medical attendant, the fact is so far rendered material that it must be disclosed or truly stated. The insurer may desire to consult with the medical man who was last in attendance, since the information possessed by him may have an important bearing upon the risk and influence largely the judgment of the insurer.[399] So where assured had raised blood, and a physician had been consulted and had prescribed for him, a non-disclosure thereof avoids the contract;[400] and if assured warrants that he has never been sick or attended by a physician, the warranty is falsified by the fact that he was attended by one about a month prior to issuing the policy.[401] If the name of the last medical attendant is asked, it must be given, whether he be a quack or a regular practitioner.[402] The words of the court in a New York case are pertinent. They are: "To constitute a medical attendance it is not requisite that a physician should attend the patient at his home; an attendance at his own office is sufficient. Of these three physicians, who was the 'usual medical attendant'? It certainly was not Dr. Greenleaf, who attended him during but one brief illness, and never before or after. Was it Dr. Ormsby, who had attended him on two occasions, visiting him in all probability not over half a dozen times? Or was it Dr. Purdy, the family physician in his father's family, upon whom he called yearly for many years for medical advice or treatment? I think Dr. Purdy could more properly be called the usual medical attendant; or whether this be so or not, it was at least a question for the jury, and there was no error in submitting it to them"; and the court also says of Dr. Purdy: "It is quite evident that he knew more about the health and constitution of the assured than any other doctor."[403] In all cases, however, where

[398] World Mut. L. Ins. Co. v. Schultz, 73 Ill. 586.

[399] Morrison v. Muspratt, 4 Bing. 60. See Brown v. Metropolitan L. Ins. Co., 65 Mich. 306; 32 N. W. Rep. 610.

[400] Smith v. Ætna L. Ins. Co., 49 N. Y. 211.

[401] Sullivan v. Metropolitan L. Ins. Co., 36 N. Y. St. Rep. 38; 12 N. Y. Suppl. 923.

[402] Everett v. Desborough, 5 Bing. 503.

[403] Cushman v. United States L. Ins. Co., 70 N. Y. 72, per Earl, J. See Cushman v. United States L. Ins. Co., 63 N. Y. 404.

questions are asked as to assured's medical attendant, consultation of physician, medical treatment, and the like, the assured should answer in good faith; having in view that the obvious purpose of the inquiry, manifest from the words used, should be considered. If in the light of the evidence presented it is apparent that the assured's answer can be viewed otherwise than as evasive and incomplete, and as intended to prevent a disclosure as to past health from the physician who could best give information as to the same, or to prevent further inquiry by the assurer, then such evasive or incomplete answer ought to avoid the contract. But courts should not by construction in any case force words out of their ordinary and accepted meaning, and if the answer given is clearly responsive to the question, according to the accepted meaning of the words used, it should be held sufficient. We believe these suggestions fully accord with the decided cases. The question whether the answers have been made in good faith is generally one for the jury.[404]

§ 2071. Medical Examiner—Statements to.[405]—Statements made to the insurer's medical examiner may undoubtedly be made material by stipulation, or they may be warranties, or only representations. In ascertaining under which division they come, reference must be had to the terms of the particular contract, subject largely to those general rules which govern in other cases of representations and warranties. The position which the medical examiner holds as agent of the company, together with his professional character, has not infrequently induced courts to incline to as favorable a construction as possible, consistent with the rules of law, of assured's statements to such medical examiner, where it is evident

[404] See cases throughout this section and examine Forbes v. Edinburgh L. Assur. Co., 10 Ct. Sess. Cas. (Scot.) 451; Phillips v. New York L. Ins. Co., 9 N. Y. Supp. 839; Hutton v. Waterloo etc. Soc., 1 Post. & F. 735; Lindenau v. Desborough, 8 Barn. & C. 586; Gibson v. American Mut. L. Ins. Co., 37 N. Y. 580; Scoles v. Universal L. Ins. Co., 42 Cal. 523; Maynard v. Rhode, 1 Car. & P. 360; Reid v. Piedmont & A. L. Ins. Co., 58 Mo. 421; Taylor's Medical Jurisprudence, ed. 1866, 760.

[405] See sec. 1987, herein.

that assured has exercised good faith and fairness in endeavoring to truthfully answer the questions asked, [406] especially so where the policy provides that such questions will be fully explained by the examiner.[407] So where the report of the insurer's medical examiner as to assured's health and condition is alone relied on by the company, rather than the assured's statements, and what is said by him to the physician is not reported to the company, the policy is not avoided by assured's incorrect answers to said examiner.[408] In a Louisiana case the application declared that the statements and representations therein contained, together with the declarations made to the medical examiner, constituted the basis of the contract, and that the same were warranted full, complete, and true, and that the warranty was a condition precedent, and the recitals of the contract contained a substantially similar provision, and referred to the application as a part thereof. Upon the reverse of the policy was indorsed a copy of the application, the medical examination, and the warranty clause of the contract, and the court declared "them one complete and homogeneous whole," and that the representations so made warranties prevented a recovery, there being a breach of said warranty.[409]

§ 2072. Medical Examiner—Subject of Inquiry.[410]—It is not possible to give a specific rule concerning what constitutes legitimate subjects of inquiry by the medical examiner. Matter which may seem unimportant may be deemed important by the examiner, and may be actually so, in ascertaining the condition of assured's health, and it is said that the assured's pecuniary circumstances may be inquired into as matter having some relation to the expectancy of life, and it has been held that the medical examiner, as a witness, might be

[406] See Mowry v. Rosendale, 74 N. Y. 360; Miller v. Mutual Ben. L. Ins. Co., 31 Iowa, 235. See sec. 412, and chap. xix, herein.

[407] Connecticut General L. Ins. Co. v. McCurdy, 89 Pa. St. 363. See sec. 311, herein.

[408] Higbee v. Guardian etc. Ins. Co., 66 Barb. (N. Y.) 462; Hogle v. Guardian L. Ins. Co., 4 Abb. Pr., N. S. (N. Y.), 346.

[409] Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405.

[410] See sec. 1987, herein.

asked whether he made such inquiry and what response was given, and how far he deemed such answer material in deciding to advise the taking of the risk, and that the very point of inquiry was whether the pecuniary circumstances were deemed by him material, and whether he would have advised the acceptance of the risk if it had not appeared that the applicant was a man of means. The court also says, referring to the purposes of a medical examination: "The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of those organs and functions to take on diseases as affected by habits of mind, as well as of body, temperament, tendency to disease from hereditary causes, and the occupation and condition in life of the subject." In this case, however, it also appeared that the assured falsely represented to the general agent of the company that he was a moneyed man.[411] We are inclined, however, to the belief that the assured is justified in presuming that the business of the medical examiner is to examine him as to his health and the physical condition of his body, and to report thereon to the company, and that this is the extent of his agency, and therefore, if such examiner inquires about a matter which upon its face bears no apparent relation to his health or physical condition, or which is out of the line of what may be reasonably assumed within the scope of a professional inquiry, that it would be but fair to the assured, before holding him bound by his answers to such questions, to require proof that the scope and bearing upon the risk of such question was explained or otherwise known to the assured, so that a basis may exist for the presumption that he answered understandingly, with a full knowledge of the materiality of his physical condition, to the matter inquired into, and that consequently he actually knew, or ought to have known, that the required information was necessary to be given to enable the medical examiner to make his report.

[411] Valton v. National L. Fund Assn., 40 N. Y. (1 Keyes) 21; reversing 17 Abb. Pr. (N. Y.) 268. See s. c., 20 N. Y. 32; 22 Barb. (N. Y.) 9; 4 Abb. Dec. (N. Y.) 437. See Missouri Valley L. Ins. Co. v. Sturges, 18 Kan. 93; 26 Am. Rep. 764.

§ 2073. Moored Safely in Certain Harbor—Warranty—Marine Risk.[412]—A warranty that the ship is safely moored in a designated harbor does not necessitate that she be kept safely moored in one place in said harbor. The need of repairs and taking in of cargo may justify her removal from one part of the harbor to another, and the warranty is complied with if she is safely moored at each place to which she is so removed.[413]

§ 2074. Occupation—Life Risk—Representation and Warranty—Continuing Warranty.[414]—If the policy is conditioned to be avoided by any untrue or fraudulent answer to the question asked in the application, answers as to assured's occupation are representations, and must be proven affirmatively to have been fraudulently made or material to the risk to avoid the policy.[415] So where in response to an inquiry as to his profession, occupation, residence, etc., the assured wrote, "Esquire Saltley Hall," the policy was held not avoided, though he kept an ironmonger's shop in the shire.[416] And a statement by assured in an application for an accident policy that his occupation is that of an "earthenware manufacturer" is not falsified by the fact that while on a visit to a farm he had received his death injury while loading hay.[417] And a warranty by assured that he is a grocer does not, in the absence of evidence of an intent to deceive, avoid the policy where he has not further disclosed the fact that he sells liquor at retail in a part of his store.[418] But it is held in another case that representations in answer to inquiries as to occupation are not warranties, but mere representations made material by the contract, and the only question for the jury is

[412] See sec. 1987, herein.

[413] Clarke v. Wetmore, Selw. N. P. 1008.

[414] See sec. 1987, herein.

[415] Southern L. Ins. Co. v. Booker, 9 Heisk. (Term.) 606; 24 Am. Rep. 344. See Hobbs v. Iowa Mut. B. Assn., 82 Iowa, 107; 47 N. W. Rep. 983.

[416] Perims v. Marine & G. T. Ins. Co., 2 El. & E. 317, 324.

[417] North American L. & A. Ins. Co. v. Burrough, 69 Pa. St. 43.

[418] McGuck v. Metropolitan L. Ins. Co., 56 Conn. 528; 1 L. R. Annot. 563.

whether they were true or false when made.[419] And if the nature of assured's business or occupation is falsely stated, as where he is asked whether he has been connected with the sale of beer, wine, or intoxicating liquors, and he falsely answers "No," there is a breach of warranty as a matter of law, which clearly vitiates the contract, and there is not, in such case, a question for the jury whether there is a breach of warranty, but the answer being false, a verdict must be directed for the insurer.[420] But where a similar question was asked, and the assured answered, "No, keep no bar and sell only at wholesale; have government license and town license," it was held a question for the jury whether the statement was so far false as to constitute a breach of warranty, where it appeared that a liquor store was kept by the assured, wherein he sold liquor by the barrel and in quantities less than five gallons, but not to be drunk on the premises.[421] The fact that assured both makes and peddles soda water is not a breach of warranty that he is a "soda water maker," where it appears that in addition to said answer the medical examiner reported, as to the effect of the occupation on the risk, that assured was "out of doors most of the time selling soda water, in my opinion a healthy occupation." [422] The occupation of school teacher is not changed by the fact that assured superintends the erection of certain buildings for his own use, and while so do-

[419] Mutual etc. Ins. Co. v. Wise, 34 Md. 582.

[420] Dwight v. Germania L. Ins. Co., 103 N. Y. 341; 57 Am. Rep. 729; 4 Cent. Rep. 529. In this case the assured had kept a hotel wherein no bar was maintained, but he had on hand a supply of wines and liquors, and was licensed and had permits to carry on the business of retailing these other liquors, to be drunk on the premises, and he sold to his guests but not to others, but had not been engaged in the business for about a year and a half before his application. It was also declared that if the proof of a fact is so preponderating that a verdict against it would be set aside as contrary to the evidence, it is the duty of the court to direct a verdict. It is not the rule that if there is a scintilla of evidence in support of a proposition, or if the evidence against it does not amount to a demonstration of its incorrectness, a question is raised which must be left to the jury.

[421] Kenyon v. Knights Templars & M. Mut. Aid Assn., 122 N. Y. 247; 25 N. E. Rep. 299; 19 Ins. L. J. 1020; 33 N. Y. St. Rep. 467.

[422] Grattan v. Metropolitan L. Ins. Co., 80 N. Y. 281; 36 Am. Rep. 617.

ing falls and is killed.[423] If one answers that he is a laborer, when in fact he has not labored for several years, such answer avoids the policy.[424] A warranty in an accident policy that assured is a switchman is not continuing in the sense that he thereby contracts not to become a brakeman, or that he will not engage in any other occupation.[425] A policy in an accident company wherein the insured's occupation is incorrectly described may be corrected after the occurrence of an accident.[426] The finding of a jury that insured was a carpenter will be contrary to evidence where it appears that his testimony that at the time of the accident he "was framing timbers, framing sets and caps," is impeached by several neighbors, and the uncontradicted testimony of one witness is that he was not a carpenter.[427] If in an application for accident insurance the applicant makes a misrepresentation as to his occupation, and the policy is conditioned upon the truthfulness of the representation, such misrepresentation will avoid the policy.[428]

§ 2075. Other Insurance—Refusal of Other Insurers.[429]—If assured is asked whether an application has been made to other companies and with what result, and he answers, "Yes, and always successful," and "Yes, accepted," which is false, in that the medical examiner declined to recommend another and prior application, the policy is void;[430] although where the question was specifically asked whether the insured had been rejected by the medical examiner of any other lodge or society, it was held that the absolute truth of his

[423] Stone v. United States Casualty Ins. Co., 34 N. J. 371.

[424] United Brethren Mut. Aid Soc. v. White, 100 Pa. St. 12.

[425] Providential L. Ins. Co. v. Fennell, 49 Ill. 180.

[426] Ford v. United States Mut. Acc. Relief Co., 148 Mass. 153; 19 N. E. Rep. 169; 1 L. R. Annot. 700.

[427] Murphey v. American Mut. Acc. Assn., 90 Wis. 206; 62 N. W. Rep. 1055; 24 Ins. L. J. 557.

[428] Murphey v. American Mut. Acc. Assn., 90 Wis. 206; 62 N. W. Rep. 1055; 24 Ins. L. J. 557.

[429] See sec. 1987, herein.

[430] Eddington v. Ætna L. Ins. Co., 100 N. Y. 536; New York L. Ins. Co. v. Flack, 3 Md. 341. See, also, Anderson v. Fitzgerald, 4 H. of L. Cas. 484.

answer was not warranted; that assured was only requested not to suppress known facts, but to answer according to his knowledge or reasonable means of belief.[431] But in a New York case it is held that if a policy has in fact been refused by another company a representation that no company has, to the applicant's best belief, refused him a policy avoids the contract where the statements are made warranties, whether known to be false or not.[432] Where the assured is asked whether applications have been made to other companies for insurance and with what result, and also as to the amounts insured in other companies, and an answer is given which is true as to part of the questions, but does not purport to be an answer as to other applications and the result, the company cannot defend on the ground that assured has not disclosed the fact that other applications have been made and rejected, for by issuing the policy it has waived the answer, and this even though the omission to answer is intentional.[433] And where an application had been made to another company, but had not been finally passed upon, it was held that a negative answer to a question whether any other application had been made upon which a policy had not been issued did not avoid the contract.[434] If the contract does not require a disclosure as to other insurance, a nondisclosure is not fatal.[435] In a Georgia case, where it appeared that a person who was a member of a benefit society, subsequently obtained two other certificates from the same society upon two separate applications, stating in each that he was not a member of the society, and each certificate provided upon its face that if the statements in the application upon which it was issued were not true the certificate should be void, it was held that both certificates should be considered void, and of no effect, unless

[431] Lum v. Supreme Lodge Knights of Honor, 29 Fed. Rep. 895; Fowkes v. M. & L. Ins. Co., 3 Fost. & F. 440.

[432] Kemp v. Good Templars Mut. B. Assn., 64 Hun (N. Y.), 437; 19 N. Y. Supp. 435.

[433] Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183; 7 Sup. Ct. Rep. 500.

[434] Langdon v. Union Mut. L. Ins. Co., 41 Fed. Rep. 272.

[435] Agricultural Ins. Co. v. Bemiller, 70 Md. 400; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345.

it appeared that at some time before receiving the last dues upon these certificates the company had notice that this identical person was a member at the time of his application for each or both of the insurances.[436]

§ **2076. Opium Habit—Life Risk.**[437]—Where the assured has been in the habit of eating opium and using laudanum to a dangerous extent, the fact should be disclosed; at least such a rule may fairly be implied from a decision where such facts existed, and it was represented that the assured was in perfect health and his general health had been good, and it was held that a full disclosure of every fact material to the risk should have been made.[438] But a man is not addicted to the exercise or intemperate use of opium unless he habitually uses it daily or often.[439]

§ **2077. Personal, Accidental, or Serious Injury—Wounds—Hurts—Life and Accident Risks.**[440]—If one is asked whether he has received any serious personal injury, and the defense is that he has answered falsely, the burden of proof is upon the insurer to show such fact. In such case evidence is held inadmissible that the deceased had told the attending physician in his last sickness that he had heard that his skull had been fractured when a child. So also is evidence inadmissible of the existence of a scar on the head where it might have been produced in other ways.[441] Where a policy was issued "upon the faith of the statements in the application, under a stipulation that if they" should be found in any respect untrue the policy should be void, it was held that although under the policy the answers to questions contained in the application must be construed as warranties that they were true in every particular, yet a negative answer to a ques-

[436] Home Friendly Soc. v. Berry, 94 Ga. 606; 21 S. E. Rep. 583.

[437] See sec. 1987, herein.

[438] See Forbes v. Edinburgh L. Assur. Co., 10 Shaw & D. 451; 4 Scot. Jur. 385.

[439] Ætna L. Ins. Co. v. Davey, 123 U. S. 739; 8 Sup. Ct. 331; 20 Fed. Rep. 482.

[440] See sec. 1987, herein.

[441] Grangers L. Ins. Co. v. Brown, 57 Miss. 308.

tion, "Has the party ever met with an accidental or serious personal injury?" will not bar a recovery when the insured had actually met with an accidental injury, such injury, however, being slight, and not affecting the future health or longevity of the insured.[442] Nor has a person received "any wound, hurt, or serious bodily injury," within the meaning of those words in an application for a life policy, although while fencing he has received a blow upon the throat by a foil, causing him to raise blood, and which produces an abrasion or hurt on the inside of the windpipe, necessitating his being confined to his bed for three days and the attendance of a physician, but from which he recovers fully without any lasting or serious results.[443]

§ **2078. Pumps—Water—Tanks Filled, etc.—Fire Risk—Continuing Warranty.**[444]—A mere representation that a force pump is connected with the building is not falsified by the fact that the pump is without hose.[445] A stipulation that there is water on each floor of a building with hose is fully satisfied by proof that hose is attached to couplings connected with waterpipes in the first and second stories, that the attic story has pipes so constructed as to overflow the same, and that the basement can be flooded with water by a steam pump.[446] Where a cotton factory was insured, and it was represented that the works were in good condition, and that there was a force pump thereon worked by a waterwheel ready and designed for use in case of fire, such warranty is not broken by the diversion of the water, thereby disabling the pump for several days, for the purpose of substituting a new bulkhead for the old and decayed one, if such repairs do not take an unwarrantable time. The fact that repairs might have been made of a less permanent character occupying less time

[442] Wilkinson v. Connecticut L. Ins. Co., 30 Iowa, 119; 6 Am. Rep. 657; affirmed, 13 Wall. (U. S.) 222.

[443] Bancroft v. Home B. Assn., 120 N. Y. 14; 30 N. Y. St. Rep. 175; 19 Ins. L. J. 468; 23 N. E. Rep. 997. And see secs. 1808, 1809, herein.

[444] See sec. 1987, herein.

[445] Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553.

[446] New York Belting Co. v. Washington F. Ins. Co., 10 Bosw. (N. Y.) 428.

does not aid the assurer in such case.[447] So a statement that the facilities for extinguishing fire are a "force pump and abundance of water" is not a continuing warranty, but only that such were the facilities at the time of the insurance.[448] And a stipulation that the force pump on the premises should be kept in working order is not a condition precedent, and only requires substantial compliance, and there is such compliance, although it was out of repair for about three months, where reasonable efforts to repair it were made, and when repaired it continued to operate until the night of the fire, when freezing prevented its operation.[449] Again, although the statement that there is plenty of water upon the premises and force pumps are warranties, yet if the application covenants only for the truth of such matters as are material to the risk so far as known to the insured, the materiality of the facts so represented is a question for the jury, and they are only warranties so far as material.[450] So the mere fact that a building is insured as that shown upon the plan, and that a force pump is marked upon the plan, does not create a continuing warranty that any particular kind of pump will always be kept ready for use. In this case the application was oral, and the plan was merely referred to as on file in the office.[451] So a stipulation to keep a supply of water constantly on top of the mill ready for immediate use is satisfied although the tank is only about two feet deep and three feet square, is fed by a small flume, and said tank is below the apex of the roof.[452] If the building is being constructed, the warranty that water tanks are to be well supplied with water must be construed with reference to the then state of completion of the building and the tanks, and whether the building of the

[447] Townsend v. Northwestern Ins. Co., 18 N. Y. 168.

[448] Gilliat v. Pawtucket Ins. Co., 8 R. I. 282; 91 Am. Dec. 229.

[449] Cady v. Imperial Ins. Co., 4 Cliff, (C. C.) 203. See Bulkley v. Protection Ins. Co., 2 Paine (C. C.), 82.

[450] Garcelon v. Hampden F. Ins. Co., 50 Me. 580. See Jones Mfg. Co. v. Manufacturers' etc. Co., 8 Cush. (Mass.) 82; 54 Am. Dec. 742.

[451] Albion Lead Works v. Williamsburg City F. Ins. Co., 2 Fed. Rep. 479. See opinion in this case.

[452] Sierra M. S. & M. Co. v. Hartford F. Ins. Co., 76 Cal. 235; 18 Pac. Rep. 267.

tanks has been continued with reasonable diligence down to the time of the fire.[453]

§ 2079. Residence—Birthplace—Life Risk.[454]—Where the policy was conditioned to be avoided by "any untrue or fraudulent answer" to the questions in the application, and the answers were not strictly true so far as related to birthplace and residence, it was held that the answers were representations, and that the company must prove affirmatively that they were fraudulently made or were material to the risk.[455] If the word "residence" is used in the sense of a permanent domicile, instead of a temporary inhabitancy, the policy is not avoided by a two years' residence in another state.[456] But if the statement as to residence is materially false, the policy will be held void.[457]

§ 2080. Relative Situation and Distance—Other Buildings—Variance in Description no Warranty that Location of Other Buildings shall Remain Unchanged.[458] If the policy requires that all buildings within a specified distance shall be mentioned, and stipulates that any misrepresentation or concealment shall avoid the contract, or makes such a statement a warranty, the assured must comply with such condition, and his omission to mention all the buildings so relatively situated vitiates the policy, as a rule, even though innocently done, but if the statement is merely a representation, it is a question for the jury whether the omission is material.[459] And the rule vitiating the policy will be especially

[453] Gloucester Mfg. Co. v. Howard F. Ins. Co., 5 Gray (Mass.), 497; 66 Am. Dec. 376.

[454] See sec. 1987, herein.

[455] Southern L. Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606; 24 Am. Rep. 344.

[456] Mobile L. Ins. Co. v. Walker, 58 Ala. 290.

[457] Huguenin v. Rayley, 6 Taunt. 186.

[458] See sec. 1987, herein.

[459] Burritt v. Saratoga Mut. Ins. Co., 5 Hill (N. Y.), 188; Frost v. Saratoga Mut. Ins. Co., 5 Denio (N. Y.), 154; 49 Am. Dec. 234; Wilson v. Herkimer Co. Mut. Ins. Co., 2 Seld. (N. Y.) 53; Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio (N. Y.), 75; Day v. Conway Ins. Co., 52 Me. 60.

enforced where the conditions annexed to the policy and the printed form of application require the fact to be stated, and the omitted buildings are of a hazardous nature, so far as danger from fire is concerned.[460] So if the assured stipulates in the application that all the exposures within the specified distance are mentioned, such stipulation, coupled with the question as to their relative situation to and distance from other buildings, the application being referred to and forming part of the policy, makes the statements warranties.[461] So the statement, made a warranty by the policy, that the house was one hundred feet from the granary, when it was only forty-six feet distant, is a fact the evidence of which may not be stricken out by the court.[462] Slight errors will not avoid the representation; as where it stated that the building was connected on one side, when it was connected on both sides with another building.[463] So it is an immaterial variance that a mill is described as situate in one corner of a section, when in fact it is across a stream in an adjacent corner of the next section.[464] An omission to mention buildings on another street, and from which there is no reasonable apprehension of danger, is not such a suppression of the truth as invalidates the policy, though the fire is communicated through them.[465] Where the assured gives the distance to the nearest buildings in each direction and describes them, it is sufficient, even though there are other buildings beyond them within the specified limits, when the question is, "How bounded and the distance from other buildings, if less than ten rods, and for what purposes occupied, and by whom?" and it appears that the assured answered the question as he understood it, and that it was accepted as sufficient at the time.[466] So although the application is made a warranty, yet if the

[460] Burritt v. Saratoga Mut. Ins. Co., 5 Hill (N. Y.), 188; 40 Am. Dec. 345.

[461] Chaffee v. Cattaraugus etc. Ins. Co., 18 N. Y. 376.

[462] State Ins. Co. v. Jordan, 24 Neb. 358; 38 N. W. Rep. 839.

[463] Stetson v. Massachusetts Mut. F. Ins. Co., 4 Mass. 330.

[464] Prieger v. Exchange etc. Ins. Co., 6 Wis. 89.

[465] Dennison v. Thomaston M. Ins. Co., 20 Me. 125; 37 Am. Dec. 42.

[466] Gates v. Madison Co. Ins. Co., 5 N. Y. (1 Seld.) 469; 55 Am. Dec. 360; 2 N. Y. (2 Comst.) 43.

statements therein are qualified by the words "so far as known to the applicant and material," an incorrect statement as to the distance of the nearest building, the assured not knowing the exact distance, does not avoid the policy.[467] So where the assured truthfully answers the questions in regard to the locality of neighboring buildings, it adds nothing in aid of assurer that the assured also states that said buildings "would not endanger" the insured property "if they should burn," for this is merely matter of opinion.[468] An insurance company authorized to insure "livestock, wagons, harness," etc., "being upon farms and farm property," but not village property within one hundred feet of other buildings, is not liable for livestock and harnesses insured as farm property, but destroyed while in a village barn within one hundred feet of other buildings.[469]

§ **2081. Relationship — Life Risk.**—If an applicant for membership in a corporation formed to accumulate a fund for the benefit of the widows and children of deceased members makes a false representation as to his relationship to the named beneficiary, this does not constitute a warranty so as to preclude his real beneficiary from recovering on the contract.[470] Where it was agreed by both parties to a contract of membership in a benefit society that the statements made therein by the applicant should be considered a warranty, and payment of any benefit be conditioned by their truth, and a statement was made by the applicant that the beneficiary was his wife, when at the time he was divorced from her, the policy was held avoided, and the right of recovery defeated.[471] Again, if one of the objects of a beneficial corporation, chartered under a statute authorizing it to pay to the widows, orphans, relatives, or dependents of a deceased

[467] Noone v. Transatlantic Ins. Co., 88 Cal. 152; 26 Pac. Rep. 103.

[468] Dennison v. Thomaston, 20 Me. 125; 37 Am. Dec. 42.

[469] Sherwood, J., dissenting; Wildey v. Farmers' Mut. F. Ins. Co., 52 Mich. 446.

[470] So held in Britton v. Supreme Council, 46 N. J. Eq. 102; 19 Am. St. Rep. 376.

[471] Smith v. B. O. R. R. Co., 81 Md. 412; 32 Atl. Rep. 181.

beneficial member a sum of money, is to establish a benefit fund out of which is to be paid to the family, orphans, or dependents of a deceased beneficial member a certain sum of money, a statement in an application for membership and insurance in such society which describes the beneficiary as the niece of the applicant is material; and if it be shown that there was no kinship between them, such false statement in the application will defeat an action to recover the payment of the insurance money, it being provided in a subsequent clause of the application that any false statement therein should forfeit all rights of the applicant or of his beneficiaries.[472]

§ **2082. Sailing—Warranty to Sail—Marine Risk.**—If a vessel is warranted to sail, the warranty must be strictly complied with, as must also the warranty that the ship has sailed or that she will sail after a specified day, and nothing excuses performance. The time of sailing may vary the risk according to the seasons of the year, or in policies "at and from" it may be important to fix the duration of the risk at the place, and limit thereby the assured's liability.[473] So a stipulation in a charter that the ship will sail on a specified day is a condition precedent to be strictly performed, regardless of the risks and causes which may prevent compliance. If not performed, the charterer may reject the vessel;[474] and if the ship sails before the day, intending to return, but finding a cargo proceeds on her voyage, there is a breach of warranty.[475]

§ **2083. Sailing—Representation as to Time of.**—A statement as to time of sailing may be a representation, and not a warranty, and if made at the time the insurance is ef-

[472] Supreme Council v. Green, 71 Md. 263; 17 Am. St. Rep. 527.

[473] Hore v. Whitmore, Cowp. 784; Vizeau v. Grant, reported in 1 Marshall on Insurance, ed. 1810, *353; Beckwith v. Lydebotham, 1 Cowp. 116; Bond v. Nutt, Cowp. 601, per Lord Mansfield.

[474] Pedersen v. Pagenstecher, 32 Fed. Rep. 841.

[475] Vizeau v. Grant, reported in 1 Marshall on Insurance, ed. 1810, *353.

fected and is material and false, it will avoid the policy; or if it be of a character to have caused the vessel to have appeared less out of time than she was in reality, it is material.[476]

§ **2084. Sailing—Representation as to Time of may be Merely of Expectation or Belief.**[477]—A statement as to the time of sailing may not be a warranty or misrepresentation of the fact, but a mere declaration of opinion, expectation, or belief; as where it is represented that the ship is "expected to sail" about or on a certain day.[478] So a statement that the vessel "will sail" from a certain port "in the course of this month," when not shown to be material to the risk, is held to be merely a statement of belief or mere expression of opinion that she will sail at the specified date.[479]

§ **2085. Sailing—Warranty to Sail may not be Engrafted on Policy by Parol Evidence.**[480]—An agreement by parol that the ship will sail before a certain day may not be ingrafted on the policy by evidence thereof to establish a warranty.[481]

§ **2086. Sailing—What Constitutes.**—A ship has sailed when she has actually quitted her mooring and broken ground, intending bona fide to at once proceed to sea on the voyage insured, she being then in a state of complete readiness and equipment therefor, with nothing remaining to be done after such commencement of the voyage.[482] And the

[476] Baxter v. New England Ins. Co., 3 Mason (C. C.), 96; Currell v. Mississippi Ins. Co., 3 La. (O. S.) 353; 9 La. 163; 29 Am. Dec. 439; Borden v. Vaughn, 10 East, 415. See secs. 1264a, 1264b, 1265, herein.

[477] See sec. 1987, herein.

[478] Rice v. New England Ins. Co., 4 Pick. (Mass.) 439; Bowden v. Vaughn, 10 East, 415; Augusta Ins. & Banking Co. v. Abbott, 12 Md. 348; Jendevine v. Slade, 2 Esp. 572; Hubbard v. Glover, 3 Camp. 313; Brice v. Featherstone, 4 Taunt. 869; Allegre v. Maryland Ins. Co., 2 Gill & J. (Md.) 136; 20 Am. Dec. 424.

[479] Allegre v. Maryland Ins. Co., 2 Gill & J. (Md.) 136; 20 Am. Dec. 424.

[480] See sec. 1987, herein.

[481] Whitney v. Haven, 13 Mass. 172.

[482] Lang v. Anderdon, 3 Barn. & C. 499, per Lord Tenterden; Thelluson v. Ferguson, 1 Doug. 346; Bond v. Nutt, Cowp. 601, per Lord

rule obtains even though after the ship has so commenced her voyage she is forced by stress of weather to stop and come to anchor, provided she intends to proceed at once on her voyage so soon as wind and weather permit, or where the vessel has moved forward for the bona fide purpose, placing herself in a more favorable situation to prosecute the voyage.[483] So if the voyage has commenced, the vessel may be justified by usage in going out of her course to join convoy, that being her only purpose in deviating,[484] or comes to anchor within her direct course for that same purpose, or having so sailed is detained by orders of government, at the port where she expects to join convoy.[485] A ship insured at and from an island may sail from port to port of the island.[486] And on much the same grounds the extent of or limits of a port, place, or harbor is not infrequently a matter entitled to weight in determining whether a vessel has sailed, especially in cases where usage enters as a factor.[487] So again, in certain cases the river navigation may be of such a character that the ship may not be enabled to fully equip herself for proceeding to sea until certain limits of navigation have been reached. In such cases it is sufficient if she is at the time of sailing as fully equipped as is consistent with the river navigation, and sails intending to perfect her fitting at the first place possible or usual; as in case of a voyage to and from Lyons to Galatz, and the ship could not pass down the Rhone to Marseilles with

Mansfield; Ridsdale v. Sheddon, 4 Camp. 107; Pettigrew v. Pringle, 3 Barn. & Adol. 514, per Lord Tenterden, C. J.

[483] Bowen v. Hope Ins. Co., 20 Pick. (Mass.) 275; Fisher v. Cockran, 5 Tyrw. 496; 4 Tyrw. 424; 2 Cromp. & M. 581; 1 Cromp. M. & R. 819. See opinion of Lord Lyndhurst in this case.

[484] Bond v. Nutt, Cowp. 601, reported in 1 Marshall on Insurance, ed. 1810, *354.

[485] Thelluson v. Ferguson, 1 Doug. 360. And see further on these last two points, Wright v. Shiffner, 11 East, 515; 2 Camp. 247; Earle v. Harris, 1 Doug. 357, 352, n.; Ridsdale v. Sheddon, 4 Camp. 107.

[486] Thelluson v. Ferguson, Doug. 346; Thelluson v. Staples, Doug. 352, n.

[487] See Dennis v. Ludlow, 2 Caines (N. Y.), 111; Lang v. Anderdon, 3 Barn. & C. 495; 1 Car. & P. 171, 480, 495 (case also of warranty "to sail from"); Williams v. Marshall, 7 Taunt. 468; 6 Taunt. 390; 1 Moore, 162.

standing masts and rigging, and she sailed from Lyons on the day named with intention to put in the mast and bend the sails at Marseilles.[488] Under a time policy, where the warranty is not to sail after a specified day for a named port, it is sufficient that the vessel is prosecuting a voyage not begun after the day designated.[489]

§ **2087. Sailing—What does not Constitute.**—The rule given under the last section comprises the factors necessary to constitute a ship's sailing, and must be fully complied with. Thus, a ship has not sailed although she has partly weighed anchor and has her sails partly set, and in heaving anchors has moved a few fathoms, but does not actually start on her voyage until after the time, by reason of the master's fears occasioned by heavy seas and severe weather;[490] nor where she has not actually broken ground, although fully ready for sea and intending to sail, but is detained by embargo,[491] provided in such case that the commencement of the risk depends upon the time of sailing;[492] nor where she has not a sufficient crew competent to carry her to her port of destination, and is obliged to stop and take on seamen; nor where she has not obtained her clearance;[493] nor where she starts without her full ballast.[494] So where in a charter of a vessel she was stated to be at B, "guaranteed to sail on or before December 10th," it was held that there a constructive sailing did not arise from the fact that, having her general cargo in, she was moored before that date, by order of the harbor master, where she filled out her crew and took on provisions, and after the 10th went out to the roadstead and sailed in a few days.[495]

[488] Bouillon v. Lupton, 15 Com. B., N. S., 113; 3 Fost. & F. 726; 33 L. J. Com. P. 37.

[489] Cochrane v. Fisher, 5 Tyrw. 496; 1 Cromp. M. & R. 809.

[490] Nelson v. Salvador, Moody & M. 309. See Meyer v. Greyson, 3 Doug. 402.

[491] Hore v. Whitmore, Cowp. 784.

[492] See 1 Phillips on Insurance, 3d ed., 428, sec. 773; 1 Parsons on Marine Insurance, ed. 1868, 360, 361.

[493] Ridsdale v. Newenham, 4 Camp. 111; 3 Maule & S. 456; Graham v. Barrar, 5 Barn. & Adol. 1011; 5 Nev. & M. 125.

[494] Pettigrew v. Pringle, 3 Barn. & Adol. 514.

[495] Pedersen v. Pagenstecher, 32 Fed. Rep. 841.

§ 2088. Sheathing Vessel.—Neither a representation nor warranty that the vessel has sheathing can be raised by construction from a stipulation in the policy of nonliability for any damage to the vessel "to or from her sheathing," but if it could, the representation is immaterial if it appears that sheathing would be regarded as of no benefit to the vessel.[496] A representation to an insurer at Boston by the assured in New York that a ship is "coppered" must conform to the meaning of that term as used in New York, the vessel being in that port.[497]

§ 2089. Ship's Safety—Warranty—Marine Risk.[498]—If ship or goods insured, lost or not lost, are warranted safe or well on a specified day, and a loss happens on that day before the subscription, the warranty is not broken if at any time on the specified day the ship was in safety.[499]

§ 2090. Smoking on Premises—Continuing Warranty—Fire Risk.[500]—Although the assured warrants that there is no smoking on the premises, this refers to the time of making the application. It is not a continuing warranty, and is not broken though the assured or other persons smoke there afterwards.[501]

§ 2091. Spirits on Board Ship—Carrying Prohibited Articles—Reasonable Construction—Marine Risk.[502]—A statement that no "spirits are allowed on board" in an application for a marine policy must be given a reasonable construction, and the fact that spirits are carried on board which

[496] Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389; 32 Am. Dec. 220.

[497] Howard v. New England M. Ins. Co., 8 Pet. (U. S.) 557; 1 Sum. (C. C.) 218.

[498] See sec. 1987, herein.

[499] Blackhurst v. Cockell, 3 Term Rep. 360.

[500] See sec. 1987, herein.

[501] Hosford v. Germania F. Ins. Co., 127 U. S. 399, 403; 8 Supr. Ct. Rep. 119. See sec. 2215, post, as to condition concerning smoking.

[502] See sec. 1987, herein.

are not for use and are not broached does not avoid the contract.[503]

§ 2092. Stay of Vessel at Certain Place Limited by Warranty—Marine Risk.[504]—If a vessel is warranted not to stay on a certain coast over a specified time, the policy is forfeited if she remains over that time, commencing after her arrival there, and being moored twenty-four hours in safety, and the loss of an anchor in a gale will not extend the time.[505]

§ 2093. Stock Kept up to Specified Amount.—If it is stipulated that the stock insured shall be kept up to a specified amount, it is no defense that said stock is not kept up to said agreed sum, nor does such failure warrant the defense of fraud, for it cannot operate to injure the insurer, since the risk is reduced by said breach.[506]

§ 2094. Stowage of Cargo—Warranty—Marine Risk.[507] It is an implied stipulation in marine policies on cargo that the goods will be properly stowed in the vessel and customary place for the carriage of goods of that character, and if the risk is varied or increased by any breach of this implied condition, the policy will be avoided, although usage may justify a stowage which would not otherwise be permitted.[508]

§ 2095. Suicide—Effect of Warranty against.[509]—If the assured warrants in his application that he will not com-

[503] Iron v. Sea Ins. Co., 22 Wend. (N. Y.) 380. See for principle of reasonable construction, Alsop v. Commercial Ins. Co., 1 Sum. (C. C.) 451, 459, and sec. 211, herein.

[504] See sec. 1987, herein.

[505] Mursden v. South Carolina Ins. Co., 1 Mill Const. (S. C.) 200.

[506] So held in Travis v. Peabody Ins. Co., 28 W. Va. 583.

[507] See sec. 1987, herein.

[508] Leitch v. Atlantic Mut. Ins. Co., 66 N. Y. 100. See, also, Taunton Copper Co. v. Merchants' Ins. Co., 22 Pick. (Mass.) 108; Lenox v. United Ins. Co., 3 Johns. C. (N. Y.) 178; Da Costa v. Edmunds, 4 Camp. 142; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Gould v. Oliver, 4 Bing. N. C. 134; Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 34; Merchants & M. Ins. Co. v. Shillito, 15 Ohio St. 559; Milward v. Hibbard, 3 Q. B. 120.

[509] See sec. 1987, herein.

mit suicide within a specified time from the date of the policy, he is bound thereby, and in effect he warrants that his mental condition will be such for the time stipulated as will prevent suicide, sane or insane.[510]

§ **2096. Temperate Habits—Drunkenness—Use of Intoxicating Liquors.**[511]—Whether a man is of temperate habits, and what constitutes drunkenness, habitual intemperance, or the habitual use of intoxicating liquors, has been a question frequently before the courts. We will include under this section conditions relating to temperate habits, drunkenness, and use of intoxicating liquors, as necessary to the proper consideration of the question indicated. The policies have evidently been so framed in numerous cases as to endeavor to cover the ground, and bind the assured to some positive stipulation. Where the case has been presented to the jury under the usual clauses, the necessity of a definition of words of the character here under consideration used in the particular policy becomes of the utmost importance; yet it is difficult, if not impossible, to give a legal definition of any of the words which can be separated. While from the particular facts of the individual case courts have attempted such definitions, they can hardly be taken as applicable to all cases wherein like words are used, except in a most general way, and for these reasons the first inquiry necessarily is, What are the facts of the particular case? Questions as to what constitutes habitual intemperance, etc., have been frequently before the courts in divorce and other cases.[512] But, as above stated, in contracts of life insurance, intemperance and like questions cannot be considered in the abstract, and independently they are involved with the point whether they impair

[510] Ballantyne v. Mutual L. Ins. Co. (1891), 25 Ir. L. T. & S. J. 538. See sections on suicide, herein.

[511] See sec. 1987, herein.

[512] See Wheeler v. Wheeler, 53 Iowa, 511 (divorce, habitual drunkenness); Lewis v. Lewis (Iowa), 39 N. W. Rep. 271 (divorce, habitual drunkenness); Blaney v. Blaney, 126 Mass. 205; (divorce, habitual drunkenness); Mahone v. Mahone, 19 Cal. 627 (divorce, habitual intemperance); State v. Pratt, 34 Vt. 223 (prosecution for selling liquors to habitual drunkard).

the health. They are dependent upon other and qualifying phrases set forth in the contract, and with the intent of the parties as evidenced by their agreement, as well as with other matters existing and in proof in the case. Again, whether the statement is a representation or warranty must be considered. Not infrequently the question is raised whether such statement is a matter of opinion or belief on the part of the assured, or has the force of a fact, and if there be a condition in the policy avoiding it for intemperance and the like, its exact terms must be construed.[513] In a case decided in the supreme

[513] The words of the court in an English case are pertinent. Lord Watson says: "I believe it to be useless to attempt a precise definition of what constitutes 'temperate habits' or 'temperance' in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drink that quantity affords no test; what one man might take without exceeding the bounds of moderation another could not take without committing excess. In judging of a man's sobriety, his position in life and the habits of the class to which he belongs must, in my opinion, be always taken into account, because it is the custom of men engaged in certain lines of business to take what is called 'refreshment' without any imputation of excess at times, when a similar indulgence on the part of men not so engaged would be, to say the least, suspicious. But I do not think that the habits of a particular locality ought to be taken into account, or that a man who would be generally regarded as of intemperate habits ought to escape from that imputation because he is no worse than his neighbors. In the present case, the evidence clearly establishes that the assured was a most able and estimable man, but that circumstance is not of much weight, because able and estimable men are not necessarily exempt from social failings. . . . . It seems to me to be the fair result of the evidence that the assured was in the habit of taking more drink than was good for him; that he was frequently affected with drunkenness on occasions when all excepting himself were sober; that his indulgence to excess had become so apparent that several of his friends remonstrated with him on the subject, and that instead of repudiating the charge he admitted it and promised amendment. These facts . . . . are, in my opinion, altogether inconsistent with the truth of the assertion that he was, on the 9th of November, 1881 (the date of the proposal), of temperate habits and had always been so. I cannot, of course, leave out of view the cause of assured's death," which was certified by the attending physician to have been chronic hepatitis, which fact was not rebutted. The court further distinguishes the case from those where some latent disease exists only discoverable by post mortem, and says the purpose of a question of this character is "to elicit the fact and not the opinion of the as-

court of the United States the question as to what constituted habitual intemperance was before the court. We believe the opinion is of sufficient importance to warrant its insertion in part and we have given it in part below.[514] Another decision

sured, and if he chooses to give a satisfactory answer, he must take the risk of its being true. If his answer is hesitating or unsatisfactory, the insurers are put upon their guard and have the option of declining the assurance, or seeking information from other sources, or of charging a higher premium": Thomson v. Weems, L. R. 9 App. Cas. 671; reviewing Scottish L. Assur. Co. v. Buist, 4 Ct. Sess. Cas., 4th series, 1076; Hutchinson v. National Loan Fund L. Assur. Co., 7 Ct. Sess. Cas., 2d series, 467; Life Assn. of Scotland v. Foster, 11 Ct. Sess. Cas., 3d series, 351; quoting from Lord Chancellor Cranworth in Andersen v. Fitzgerald, 4 H. L. Cas. 503, and Knickerbocker L. Assur. Co. v. Foley, 15 Otto (U. S.), 350. So far as it decides that "in the case of an intemperate man delirium tremens is occasioned by abstinence from drink, and in the case of a temperate man by indulgence in liquor," and also on the ground that a finding of fact by the jury can form no ground for a precedent for the guidance of a court of law, even though the court may have refused to set it aside.

[514] Northwestern L. Ins. Co. v. Muskegon Nat. Bank, 122 U. S. 501; 25 Cent. L. J. 300; 7 Supr. Ct. Rep. 1221, opinion by Mr. Justice Miller. "The Muskegon National Bank recovered a judgment in the circuit court of the United States for the southern district of New York, against the Northwestern Mutual Life Insurance Company, upon a policy of insurance on the life of Erwin G. Comstock for twenty-three thousand seven hundred and seventeen dollars and four cents, and to this judgment the present writ of error is directed. The bank had an insurance upon the life of Comstock, its debtor, for the sum of twenty thousand dollars. On the trial before the jury, although some other issues were made in the pleadings, the contest turned, so far as the assignments of error are presented here, on the condition of Comstock in regard to the habit of drinking alcoholic liquors. The policy, and the application for it, the answers to which were signed both by Comstock and the bank through its president, present the foundation of the controversy. The sixteenth interrogatory is as follows: 'Are you, or have you ever been, in the habit of using alcoholic beverages or other stimulants.' The answer to this was, 'Yes; occasionally.' The twenty-second interrogatory, 'Have you read and assented to the following agreement?' was answered, 'Yes.' This agreement, so far as it touches the present issue, reads as follows: 'It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the applicant is not, and will not become, habitually intemperate or addicted to the use of opium.' The body of the policy declared that if Comstock shall become intemperate, so as to impair his health or induce delirium tremens, or if any statement in the

in the federal courts holds that the answer that assured had never been addicted to the intemperate use of liquors must

application, on the faith of which the policy is made, shall be found to be in any material respect untrue, the policy is void. . . . . We do not know of any established legal definition of those words. As they relate to the customs and habits of men generally in regard to the use of intoxicating drinks, and as the observation and experience of one man on that subject is as good as another of equal capacity and opportunities, their true meaning and significations would seem to be a question addressed rather to the jury than to the court. While there may be, on the one hand, such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a condition of habitual intemperance, or, on the other, such an entire absence of any proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry, and the determination of the question within it, must be submitted to the jury, and the question on this submission must be decided by them. The testimony in this case is all embodied in the record, and is contradictory. It must be divided into its relations to the two periods—before and after the execution of the policy. It is seen from the testimony that Comstock left Muskegon, where many of these witnesses resided who testify as to his excessive use of intoxicating drinks prior to 1875, and that they know nothing of his habits after that. The policy was taken out in 1879. It is also quite clear that, under a pledge made to one of his partners in business, he had refrained from the use of intoxicating drinks from the 1st of June, 1878, up to the time of taking out this policy, and continued so to refrain up to March, 1880. There are several witnesses who testify that, after his removal to New York in 1875, he was drunk, had sprees once in a while, and perhaps several of them, up to the time when he made this pledge to his partner. There are others who testify that, after March, 1880, he was again seen intoxicated, and had spells of confinement on account of those sprees. On the other hand, there were four or five witnesses examined, some of whom were in the same building in which Comstock was employed in New York, who saw him daily, and transacted business with him for the two or three years prior to his death, which was in 1881, who testify that they never saw him drunk, or under the influence of liquor, and did not suppose that he was addicted to drinking; but that he was a prompt, efficient business man, and that they had no suspicion that he was intemperate, or indulged in the excessive use of stimulants. Among these, Mr. Samuel Borrow, vice-president of the Equitable Life Assurance Society, in whose building Comstock was a tenant, says that he saw him almost daily for two or three years prior to his death; that he struck him as a very energetic, active man; and that he never saw him under such circumstances as to suggest that he had been drinking. Under these circumstances, and in view of this conflicting testimony, the following language of the judge in his charge

be referred to a time prior to the issue of the policy; that if the policy is conditioned to be void if assured shall become so

to the jury in this case seems to contain all that was necessary for him to say by way of assisting them to arrive at a just verdict: 'I think that there is no rule of law which says that, in order to make a man a drunkard, he must drink every day or every week to excess. Neither, on the other hand, does a single or an occasional excess make a man an habitual drunkard; but if you find that the habit and rule of a man's life is to indulge periodically and with frequency, and with increasing frequency and violence, in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness. It is the fact of the certainty of these periodical sprees, accompanied with their frequency, which marks the habit. If a man should indulge in such a debauch once in a year only, it could not, in my opinion, properly be said that he was an habitual drunkard; he would be an occasional drunkard. But if such debauches increased in frequency, and the certainty of their increasing frequency becomes established, then the time finally arrives when the line between an occasional excess and habit is crossed. It is for you to say whether Comstock was, at the time of the application, or became afterward, the victim of such a habit. If you find that, after the making of the policy, Comstock became so far intemperate as to impair his health, the policy is avoided, and the verdict will be for the defendant.' At the request of the defendant, he also gave to the jury the following instructions: 'If the jury find from the evidence that Erwin G. Comstock was habitually intemperate when the application for the policy of insurance was made, then they must find for the defendant. If the jury find from the evidence that Edwin G. Comstock became habitually intemperate after the issuing of that policy, then they must find for the defendant. If the jury find from the evidence that, after the making of the policy, Erwin G. Comstock became so far intemperate as to impair his health, then they must find for the defendant.' . . . . What effect should be given to an entire abstinence from the use of liquors, for a whole year, in connection with occasional drunken sprees before or after, is not for the court to determine. . . . . It would be rather harsh for a court to instruct a jury, as a matter of law, that a man who was sober nearly two years was at a period near the middle of that time 'habitually intemperate.' It was certainly a question to be left to the jury, on all the testimony, to draw their own conclusions in regard to the subject. . . . . The court had no right in this summing up to ignore the testimony of four or five respectable and intelligent gentlemen who knew Comstock well during the most important part of this period, during several years of it, who saw him almost daily, and who testify that they never had any reason to suppose that he used ardent spirits at all, much less to excess. It was for the jury to weigh all these circumstances, and to determine in view of them all whether he was habitually intemperate. There are very few decisions by courts

far intemperate as to impair his health, an excessive use of liquor even though it does not induce delirium tremens, vitiates the policy, and that it is a question of fact whether such intemperance caused the death of assured. This case also holds that such intemperance need not necessarily continue down to the time of the last illness.[515] In another case a statement that assured has been and is of temperate habits is not necessarily falsified by the fact that he has had delirium tremens, and that the declaration is true if his usual and every day life was temperate.[516] In a Canada decision the pol-

of high character relating to this question. The principal one which has been brought to our attention is Insurance Co. v. Foley, 105 U. S. 350. In that case the insured, in answer to the question, 'Is the party of temperate habits; has he always been so?' answered 'Yes'; whereas the defendant company alleged that in fact he was a man of intemperate habits. The court, through Mr. Justice Field, said: 'The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an occasional case of excess justify the application of this character to him. An attack of delirium tremens may sometimes follow a single excessive indulgence. . . . . When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. . . . . The court did not, therefore, err in instructing the jury that, if the habits of the insured, "in the usual, ordinary, and everyday routine of his life, were temperate," the representations made are not untrue, within the meaning of the policy, although he may have an attack of delirium tremens from an exceptional overindulgence. It could not have been contemplated, from the language used in the policy, that it should become void for an occasional excess by the insured, but only when such excess had, by frequent repetitions, become a habit. And the testimony of witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate.' We think this language eminently applicable to the case before us. . . . . The judgment of the circuit court is therefore affirmed."

[515] Ætna L. Ins. Co. v. Davey, 124 U. S. 31; (L. ed. 315); 123 U. S. 739; 8 Sup. Ct. Rep. 333; reversing 20 Fed. Rep. 482. See 38 Fed. Rep. 650; 18 Ins. L. J. 665, 811.

[516] Knickerbocker L. Ins. Co. v. Foley, 105 U. S. 350; cited with approval in Northwestern etc. Co. v. Muskegon etc. Bank, given in full in the third note under this section; doubted in Thomson v. Weems, as noted in the second note under this section. See Swick v. Home L. Ins. Co., 2 Dill. (C. C.) 160; 2 Ins. L. J. 415; Brockway v. Mutual

icy was so worded as to make the question not so much of what constituted intemperance, as one whether insured's habits as to temperance had been so far altered as to increase the risk.[517] In a Colorado case the policy was revived by a creditor, with the knowledge of insurer's president that insured had become so far intemperate as to impair his health, and the plaintiff was permitted to recover.[518] In England, in addition to the decision already noted, it is held that if the jury find that assured was not of temperate habits at the time the proposal was made, the policy is avoided, even though the statement was made in good faith,[519] and that the jury ought to decide upon the weight of evidence whether the assured was of temperate habits at the time of the insurance, and that it is not a question whether he was intemperate to such a degree as to injure his health.[520] In Illinois, a case was decided wherein the assured was held to have forfeited his rights under a benefit certificate for violation of an agreement of total abstinence.[521] In another case in the same state statements of the member of a mutual benefit society as to his habits were held representations, and not warranties, not avoiding the policy when made in good faith, even though partly untrue.[522] In Indiana, it is held that the use of intoxicating liquors to the extent of impairing the health seriously, but which does

etc. Ins. Co., 9 Fed. Rep. 249; Ranney v. Mutual B. L. Ins. Co. (U. S. C. C. Mass. 1873).

[517] Boyle v. Phœnix Mut. L. Ins. Co., Ram's App. Cas. (L. C.) 379; 14 Can. S. C. Rep. 723 (three judges dissenting.)

[518] Pomeroy v. Rock Mountain Ins. etc. Inst., 9 Colo. 295.

[519] Hutton v. Waterloo L. Ins. Co., 1 Fost. & F. 735.

[520] Smithcombe v. Merriman, 1 Car. & M. 286.

[521] Royal Templars of Temperance v. Curd, 111 Ill. 284.

[522] Northwestern B. & Mut. Aid Soc. v. Cain, 21 Ill. App. 47. See further Richards v. Richards, 19 Bradw. (Ill. App.) 435; Murphy v. People, 90 Ill. 59. It is also held in the appellate court in that state that if the statements in an application for membership in a mutual benefit society are made warranties, and the applicant states in his application that he uses liquors to no extent, the fact that he does use alcoholic stimulants occasionally will not, it is held, avoid the insurance, unless there appears to be to some extent a habit or custom in using them: Grand Lodge A. O. U. W. v. Belcham, 48 Ill. App. 346. But see Mutual L. Ins. v. Simpson (Tex. S. C. 1895), 31 S. W. Rep. 501; reversing (Tex. Civ. App. 1894), 28 S. W. Rep. 837.

not permanently injure it, will not operate as a forfeiture of the contract, under a condition that it shall be invalidated if assured "shall become so far intemperate" as to impair his health seriously and permanently or induce delirium tremens,[523] and that a general stipulation as to forfeiture for a certain degree of intemperance is controlled by a specific and separate stipulation that the company may cancel the policy if the assured becomes intemperate to a certain degree.[524] So in the same state, where the issue was upon the question what constituted temperate habits in respect to the use of intoxicating liquors, it was held that this referred to the applicant's habits at the date of the application, and excluded findings of the jury as to previous habits.[525] In Kentucky, it has been held if assured warrants that he is of temperate habits, and has not taken a drink for over a year, that evidence may be given of acts of intemperance done within a sufficiently reasonable time prior to the making of the proposal to have allowed the habit to be formed.[526] In Louisiana, if the policy stipulates that it shall be void if any untrue answer has been made, and the assured declares that his habits then were, and always had been, temperate, the contract is avoided if the answer is untrue, although made in good faith and without intent to deceive.[527] In Missouri, if the statement as to sober and temperate habits is true when made, assured's subsequent intemperate habits do not avoid the contract.[528] In Nebraska, where one was insured in a mutual benefit society, it was held that the failure to declare a forfeiture for the excessive use of liquors during assured's lifetime prevented the company from raising such an objec-

[523] Ætna Ins. Co. v. Deming, 123 Ind. 384; 24 N. E. Rep. 86.

[524] Northwestern Mut. L. Ins. Co. v. Hazlett, 105 Ind. 212; 55 Am. Rep. 192.

[525] John Hancock etc. Ins. Co. v. Daly, 65 Ind. 6. See, also, 8 Ins. L. J. 319.

[526] Mutual L. Ins. Co. v. Giorden (Ky. Super. Ct. 1892), 13 Ky. L. Rep. 970.

[527] Hartwell v. Alabama Gold L. Ins. Co., 33 La. Ann. 1353; 39 Am. Rep. 294.

[528] Reichard v. Manhattan Ins. Co., 31 Mo. 518. See further Gartside v. Connecticut Mut. L. Ins. Co., 8 Mo. App. 592.

tion for the first time after death to defeat a recovery.[529] In New York, if there is a warranty against habitual intemperance, it is not necessary to prove that the health has been impaired to sustain the defense of a breach of warranty;[530] and the word "temperate" as a warranty is held to mean, not that assured totally abstains, but that he is moderate in the use of intoxicants, and refrains as a habit from excessive indulgence,[531] and that assured, if not generally or specifically inquired of as to the habit of intemperance, is not obligated to disclose the same, although it may be prejudicial to his health.[532] In Ohio, a warranty that the applicant has never been intemperate and is of correct and temperate habits, is not broken by occasional excessive indulgences, although a continuous and daily use of intoxicating drinks is not necessary to constitute intemperate habits, [533] but that if assured has been addicted to periodical and habitual spreeing, the contract will be void.[534] In a Pennsylvania case the stipulation was that if assured should become so intemperate as to seriously and permanently impair his health, or induce delirium tremens, the policy should be void, and it was held that habitual intemperance was not meant unless it had the exact effect stipulated, and that any less effect was insufficient;[535] but a witness may be asked, under the issue of falsity of a declaration of temperate habits, whether he had ever seen the insured under the

[529] Grand Lodge A. O. U. W. v. Brand, 29 Neb. 644; 46 N. W. Rep. 95.

[530] McGinley v. United States L. Ins. Co., 77 N. Y. 495. See Shader v. Railway Pass. Ins. Co., 66 N. Y. 44; 5 Thomp. & C. (N. Y.) 643; Van Valkenburg v. American Popular L. Ins. Co., 70 N. Y. 605; Horton v. Equitable L. Assur. Soc. (N. Y. C. C. P. 1870), 2 Big. L. & A. I. Cas. 108; Furness v. Mutual Ins. Co. (Supr. Ct. N. Y.), 11 Rept. 98.

[531] Meacham v. New York State Mut. B. Assn., 30 N. Y. St. Rep. 874; 24 N. E. Rep. 283.

[532] Rawls v. American L. Ins. Co., 36 Barb. (N. Y.) 357. But see Rawlins v. Desbrough, 2 Moody & R. 328.

[533] Union Mut. L. Ins. Co. v. Reif, 36 Ohio St. 596; 38 Am. Rep. 613.

[534] Mutual B. Ins. Co. v. Hollerhoft, 2 Cinc. (Ohio) 379.

[535] Odd Fellows' Mut. L. Ins. Co. v. Rohkopp, 94 Pa. St. 59; 9 Ins. L. J. 787. See Knecht v. Mutual L. Ins. Co., 90 Pa. St. 118; 35 Am. Rep. 641.

influence of liquor, and also whether he had ever seen the assured drunk more than once.[536] In Rhode Island, it is held that assured need not have been strictly temporate, and although he occasionally used liquor, yet if he did not indulge to an excess, he was not intemperate or addicted to the excessive use of alcoholic liquors.[537] In Texas, evidence of the knowledge of insured's agent as to assured's habits of drunkenness must be properly set up in the replication to render it admissible.[538]

§ **2097. Tobacco—Moderate Use of.**—The "moderate" use of tobacco implies a habit more or less fixed.[539]

§ **2098. Trade and Employment of Ship—Marine Risk.**[540] The trade and employment of every ship must be strictly in accordance with law, and this includes municipal law, the law of nations, and commercial treaties with the country to which the vessel belongs; for such treaties bind the subjects of the countries which are parties thereto, as well as their own municipal laws. The trade and employment must also be not only lawful, but must be lawfully prosecuted. This rule also extends to the navigation and conduct of the ship, and to the master's legal qualifications. The ship is also obligated to carry all such documents and papers as are required by the

[536] United Brethren Mut. Aid Soc. v. O'Hara (Pa.), 13 Atl. Rep. 932.

[537] Mowry v. Home Ins. Co., 9 R. I. 346.

[538] Texas Mut. L. Ins. Co. v. Davidge, 51 Tex. 244. For other cases wherein habitual intemperance and like habits have been considered, see Hartwell v. Alabama etc. L. Ins. Co. (Ala.), 11 Ins. L. J. 897; Hogins v. Supreme Council etc., 76 Cal. 109; 18 Pac. Rep. 125; Chattock v. Shaw, 1 Moody & R. 498; Watton v. Watton, 34 Kan. 195; Miller v. Mutual B. L. Ins. Co., 34 Iowa, 222; Magahaz v. Magahaz, 35 Mich. 210; Commonwealth v. Whitney, 11 Cush. (Mass.) 477; Bachelder v. Bachelder, 14 N. H. 380; Ludwick v. Commonwealth, 18 Pa. St. 172; State v. Pratt, 34 Vt. 223; New York L. Ins. Co. v. La Boileaux, 5 Big. L. & A. I. Cas. 437; Fox v. Pennsylvania etc. Ins. Co., 4 Big. L. & A. I. Cas. 458; States v. Drew, 5 Mason (C. C.), 28; Taylor's Medical Jurisprudence, 741, et seq. See note, "Warranty of temperate habits," etc., 38 Am. Rep. 615-17.

[539] Ancient O. U. W. v. Belcham, 48 Ill. App. 346, per Wall, J.

[540] See sec. 1987, herein.

existing treaties above mentioned and the law of nations.[541] But this rule does not refer to such acts as are collateral to, but which may affect trade and navigation.[542] The term "lawful trade" refers to an employment by the owners, and not to the ship's being barratrously employed by the master.[543] A warranty not to use certain specified ports under an insurance to navigate the Atlantic ocean between Europe and America may be construed to describe the trade in which the vessel is engaged, rather than a stipulation confining the insurance to those portions of her voyage specified.[544] A warranty under a time policy not to carry grain across the Atlantic is broken if the vessel is then carrying grain, although she is just entering harbor after a voyage across the Atlantic.[545] "Lawful goods" does not amount to a warranty that goods are not contraband.[546] A stipulation not to be employed in the cotton trade is broken if the vessel insured is on each of several trips chiefly loaded with cotton, although at the time of loss she is loaded with corn and has no cotton on board, and is engaged for several trips thereafter to carry corn.[547]

§ 2099. "Uninsured"—Policy on Another Subject Matter—"Honor Policy."—Where the insurance was on the hull and machinery of a steamship for "five thousand pounds, warranted uninsured," but it appeared that insurances had

[541] Christie v. Secretan, 8 Term Rep. 192, per Lord Kenyon and Lawrence, J.; Emron, 2 C. Rob. Adm. 1, 6, per Lord Stowell; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 237; 5 Am. Dec. 339; Farmer v. Legg, 7 Term. Rep. 186; The Sisters, 5 C. Rob. Adm. 555, per Lord Stowell; Wilson v. Marryatt, 8 Term Rep. 31; The Vigelantia, 1 C. Rob. Adm. 1; 1 Marshall on Insurance, ed. 1810, *178.

[542] Redman v. Smith, 7 Man. & G. 457.

[543] Havelock v. Hancel, 3 Term Rep. 277.

[544] Merchants' Mut. Ins. Co. v. Allen, 7 Sup. Ct. 821. The clause was "warranted by the assured not to use port or ports in Eastern Mexico, Texas, nor Yucatan during the continuance of this insurance, nor ports in the West India Islands between July 15th and October 15th, nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe north of Antwerp between November 1st and March 1st."

[545] Sawyers v. Coasters' Mut. Ins. Co., 6 Gray (Mass.), 221.

[546] Selon v. Low, 1 Johns. Cas. (N. Y.) 1.

[547] Gaty v. Phœnix Ins. Co., 30 Mo. 56.

been effected on "disbursements" for two thousand six hundred pounds by means of "honor" policies, it was held that although the "honor" policies were void under 19 George II, chapter 37, they were effective to operate as a breach of warranty, but not being on any part of the subject matter insured under the policy in question, but on "disbursements" alone, there was no breach of warranty.[548]

§ 2100. Unmarried—Married—Widower—Wife.[549]—If a married man represents himself as single, there is a breach of the warranty.[550] So where assured was married and stated that he was a widower, it was held such a material representation as avoided the contract.[551] Where one representing himself to be a married man effects an insurance on his own life for the benefit of his alleged wife, and as her agent, when in fact the marriage is void by reason of the reputed wife having a former lawful husband living at the time, and the policy contains a provision that any false statement by assured shall invalidate it, it is held that the policy is not void by reason of the illegality of the last marriage, unless it appears that the said reputed husband and wife knew at the time the insurance was effected that at the time of their supposed marriage the lawful husband was living and the marriage illegal, and failed to inform the company of the fact.[552]

§ 2101. Use and Occupation—Whether Continuing Warranty—Fire Risk.[553]—A description in the application of the uses to which the premises are to be applied, or as to occupancy, does not constitute a continuing warranty that they shall be used for no other purposes, or not otherwise occupied

[548] Roddick v. Indemnity Mut. M. Ins. Co., 1 L. R. Q. B. D. (1895) 836; affirmed as to the last point, 2 L. R. Q. B. D. (1895) 380. As to the first point, quaere, whether the court below held rightly.

[549] See sec. 1987, herein.

[550] Jeffries v. Union Mut. L. Ins. Co., 1 McCrary (U. S.), 114 1 Fed. Rep. 450.

[551] United Brethren Mut. Aid Soc. v. White, 101 Pa. St. 12.

[552] Equitable L. Ins. Co. v. Pattersen, 41 Ga. 338; 5 Am. Rep. 535. See, also, Holabird v. Atlantic Mut. L. Ins. Co., 2 Dill. (C. C.) 166.

[553] See sec. 1987, herein.

than as stated; such statement is a representation, the falsity of which must be proven by the assurer, and if proven, it avoids the contract.[554] And a statement that a house is occupied by a certain named person is not a promissory warranty of such person's continued occupation, and, if the house becomes vacant, there is no breach of the warranty, as it relates in time to the date of the policy and its then occupation.[555] Although special rates are charged, the policy is not avoided by a change of the represented use, which does not increase the risk, and which as changed is still of the same character of risk, calling for the same rates.[556] If a policy upon goods does not require a statement of the occupancy of the building in which they are located, a failure to disclose the same does not avoid the contract. If the occupancy in such case is stated, it is not a warranty, but a representation, the mere falsity of which is not material where it does not occasion the loss.[557] Where, however, the terms of the contract make such statements as to use and occupation warranties, they are not, as a rule, promissory or continuing warranties, but only that the property was so used or occupied at the time stated; that is, merely a warranty in praesenti.[558] The policy may, however, be so worded as to make such warranty continuing.[559]

§ 2102. Use and Occupation—Constantly Worked—Unlawful Act not Implied.[560]—Although it is stated that the premises are constantly worked, the building being

[554] New England F. & M. Ins. Co. v. Wetmore, 32 Ill. 221; Mullin v. Vermont Mut. Ins. Co., 54 Vt. 223; Howard etc. Ins. Co. v. Cornick, 24 Ill. 455; Smith v. Mechanics & Traders' Ins. Co., 32 N. Y. 399; 29 How. Pr. (N. Y.) 384.

[555] O'Neil v. Buffalo F. Ins. Co., 3 N. Y. (3 Comst.) 122. See Frisbie v. Fayette Mut. Ins. Co., 27 Pa. St. 325.

[556] Smith v. Mechanics' etc. Ins. Co., 32 N. Y. 399.

[557] Howard etc. Ins. Co. v. Cornick, 24 Ill. 455; Browning v. Home Ins. Co., 71 N. Y. 508; 27 Am. Rep. 86.

[558] Woodruff v. Imperial F. Ins. Co., 83 N. Y. 133; Alexander v. Germania F. Ins. Co., 66 N. Y. 464; 23 Am. Rep. 76, and n. 79; United States F. & M. Ins. Co. v. Kimberry, 34 Md. 224; 6 Am. Rep. 325, and cases under following sections.

[559] Poor v. Humboldt Ins. Co., 125 Mass. 274; 28 Am. Rep. 228. See sections following.

[560] See sec. 1987, herein.

described as a mill used for drying paper, and although it is stipulated that the statements are a just, true, and full exposition of all the facts and circumstances material to the risk, such statement does not amount to a warranty that the mill shall be worked on Sunday, for an unlawful act will not be implied. It will be construed to mean constantly worked during the usual working days and hours; nor does the fact that the only work carried on at night is the process of drying constitute a substantial error.[561] Whether working Sundays would be an illegal act ought it would seem to depend upon some statutory enactment, prohibitive in character.[562]

§ 2103. Use and Occupation—Dwelling-house—Boarding-house—Hotel, etc.[563]—If a building is insured and described as a dwelling-house, or declared to be occupied or used as a dwelling, or unoccupied, it is as a rule a mere representation or matter of description only, which must be materially false to avoid the policy, or a change in the use and occupation must materially increase the risk. But in those cases where from the stipulations of the contract such statement amounts to a warranty, the warranty must be referred to the time of making the proposal. It is not a continuing warranty that it shall be continued to be used and occupied as stated during the entire risk, or that the use and occupation shall not be changed.[564] In a New York case a statement that the

[561] Prieger v. Exchange etc. Ins. Co., 6 Wis. 88.

[562] Under the Sunday laws one who engages in business is presumptively engaged in an illegal transaction, subject to rebuttal by justifying circumstances: Cooley on Torts, 2d ed., 175, *152, et seq. Contracts made on Sunday were as valid at the common law as if made on any other day, but prohibited by the Sunday statutes, are void: 7 Wait's Actions and Defenses, 114-23. See 8 Wait's Actions and Defenses, 557. See 3 Parsons on Contracts, 7th ed., 898-907. But see sec. 2112, herein, as to warranty that watchman will be kept every night.

[563] See sec. 1987, herein.

[564] Bryan v. Peabody Ins. Co., 8 W. Va. 605 (held not a warranty, but mere matter of description: Joyce v. Marine Ins. Co., 45 Me. 168; 71 Am. Dec. 536 (held matter of description merely and not a continuing warranty); Cumberland etc. Co. v. Douglass, 58 Pa. St. 419; 98 Am. Dec. 298 (held not a continuing warranty); Alexander v. Germania F. Ins. Co., 66 N. Y. 464; 23 Am. Rep. 76, and n. 79 (case

building was used for a dwelling was held not a warranty that the building was used at the time as stated, but simply that such was the character of the building; that it was fitted and designed for that use, and the policy was not avoided, even though it was unoccupied at the time;[565] although in another case the description of the building as a dwelling-house was held a warranty of exclusive use for that purpose, and that there was a breach where the building was used for a purpose coming within the class designated as extra-hazardous, such as its occupation in the past for a billiard saloon and bar.[566] Although it is held in another case that the description of a building as a "dwelling-house" is not, in the absence of misrepresentation or concealment as to the fact of occupation, a warranty that the building is occupied as a dwelling, and the omission of the applicant to disclose the fact that the building is vacant, in the absence of any inquiry on that point is not a breach of a condition that any omission to make known every material fact shall avoid the policy.[567] So where an insurance was upon the building and furniture therein, it was held not necessarily a continuing warranty of occupation as stated, and that the vacancy of the house was not per se an increase of risk,[568] the burden of proof of such increase of hazard being on the insurer.[569] Although if in addition to

holds the clause a warranty and policy void if house not occupied at the time as stated); Rafferty v. New Brunswick F. Ins. Co., 3 Har. (N. J.) 480; 38 Am. Dec. 525 (held not a warranty that it will not be used for any other purpose); O'Neil v. Buffalo F. Ins. Co., 3 N. Y. (3 Comst.) 122 (not a continuing warranty of occupation); Burlington Ins. Co. v. Brockway, 138 Ill. 644; affirmed, 39 Ill. App. 43; 28 N. E. Rep. 799 (occupancy held matter of mere description and not continuing warranty); Planters' Ins. Co. v. Sorrels, 1 Baxt. 352; 25 Am. Rep. 780 (not avoided by subsequent change in use); Heffron v. Kittanning Ins. Co., 132 Pa. St. 580; 20 Atl. Rep. 698 (held not a warranty but mere description); Thayer v. Providence-Washington Ins. Co., 70 Me. 531 (building unoccupied at time of fire held immaterial unless risk increased).

565 Woodruff v. Imperial F. Ins. Co., 83 N. Y. 133.

566 Sarsfield v. Metropolitan Ins. Co., 61 Barb. (N. Y.) 479; 42 How. Pr. (N. Y.) 97.

567 Browning v. Home Ins. Co., 71 N. Y. 508; 27 Am. Rep. 86.

568 Cumberland Valley etc. Co. v. Schell, 29 Pa. St. 31.

569 Planters' Ins. Co. v. Sorrels, 1 Baxt. 352; 25 Am. Rep. 780.

the description as a dwelling-house the policy is conditioned to be void for any increase of hazard by change of use or occupancy, there is then a continuing warranty of use, but the question whether a change in use increases the hazard is for the jury.[570] A warranty that the insured premises are "occupied as a boarding-house" is not broken by their occupancy in part as a bar-room and billiard-room, where such occupancy is not forbidden and does not increase the risk.[571] And a statement that the building is occupied as a "dwelling and boarding-house" is held a warranty of its then occupation.[572] So the declaration of occupation as "hotel with bar and billiard-room attached" constitutes a warranty of exclusive use at that time as stated, the policy stipulating that false representations or concealment as to the use shall avoid the contract.[573] And if the building is described as a "hotel," it is sufficient that it is then so used.[574] If, however, the policy warrants that a family shall live in the house throughout the year, such warranty is not complied with where at the time of the fire, and for some time previous, the premises were occupied only by two workmen, who ate and worked elsewhere during the day, but kept their trunks and clothing in the house and slept there at night.[575] But where a policy was upon goods described as contained in a dwelling-house "occupied all the year round," it was held sufficient compliance with the warranty that the building was so occupied at the time of insurance and of loss, where it also appeared that it was permanently occupied during the entire period with the exception of about a month, and that the occupation was resumed about six months before the loss.[576] A clause in the policy that barns are "used for hay, straw, grain unthreshed,

[570] Germania F. Ins. Co. v. Deckard, 124 Ind. 490; 28 N. E. Rep. 868.

[571] Martin v. State Ins. Co., 44 N. J. L. (15 Vroom) 485; 43 Am. Rep. 397.

[572] Franklin F. Ins. Co. v. Martin, 40 N. J. L. 468.

[573] Baker v. German F. Ins. Co., 124 Ind. 490; 24 N. E. Rep. 1041.

[574] Hall v. People's Mut. F. Ins. Co., 6 Gray (Mass.), 185.

[575] Poor v. Humboldt Ins. Co., 125 Mass. 274; 28 Am. Rep. 228.

[576] Ring v. Phœnix Assur. Co., 145 Mass. 426; 14 N. E. Rep. 525; 5 N. E. Rep. 387.

stabling, and shelter," is not a continuing warranty of exclusive use for such purposes. The words are a description, or, at most, a warranty that the buildings at the time they were insured were as described.[577] A claim that a building was warranted to be occupied by the insured and his family cannot be sustained when his answer to the question contained in the application, "Each story how occupied?" is this, "Second story by tenant as a lodging-house." [578]

§ 2104. Use and Occupation—Hazardous Trade or Business.[579]—If the fact is known to the company's agent that a hazardous trade is carried on in an adjoining building, and an extra premium is charged by reason thereof, the policy is not avoided because such fact is not recited therein.[580] But a prohibition against exercising a hazardous or extrahazardous business is in effect a prospective or promissory warranty, the violation of which avoids the policy, although it has been discontinued.[581]

§ 2105. Use and Occupation—House of Ill-fame.[582] Although the warranty is that the insured building is occupied as a hotel, it being leased for that purpose and apparently so used, no breach arises from the fact that it is then occupied and used as a house of ill-fame, the assured not having knowledge thereof and not consenting thereto.[583] In determining the materiality of the fact not disclosed that the insured property was used as a house of ill-fame, the point should be considered that increased premiums are not charged on risks of such a character, and the natural consequences of such use are only to be regarded; acts of lawless violence are not such.[584]

[577] Billings v. Tolland Co. etc. Ins. Co., 20 Conn. 139; 50 Am. Dec. 277.

[578] Menk v. Home Ins. Co., 76 Cal. 51; 9 Am. St. Rep. 158.

[579] See sec. 1987, herein.

[580] Southern Ins. etc. Co. v. Lewis, 42 Ga. 587.

[581] Mead v. Northwestern Ins. Co., 7 N. Y. 530.

[582] See sec. 1987, herein.

[583] Hall v. People's etc. Ins. Co., 6 Gray (Mass.), 185.

[584] Loehner v. Home Mut. Ins. Co., 17 Mo. 247. See sec. 2218, post, "Use of premises for unlawful purpose."

§ **2106. Use and Occupation—Manufactory.**[585]—Where the property was described as a four-story warehouse, "first floor occupied by machinery used for making barrels, with privilege of storing barrels on the premises and other merchandise not more hazardous," and a true and accurate description of the use and occupation was stipulated, otherwise the policy to be forfeited, it was held that this was not a continuing warranty, but a warranty in praesenti.[586] A warranty that the property is a paper-mill is not broken merely by discontinuing the use of the paper-mill, and putting in a pair of mill stones for grinding in place of the rag cutter and duster, all the other machinery continuing the same as before,[587] and the drawing of a lottery with the consent and participation of the assured in a building insured against loss by fire as a "shoe manufactory" does not avoid the policy on the building, nor on the stock therein,[588] so although the contract states that no steam engine is used, this does not preclude the erection of one thereafter, provided it does not increase the risk. In this case there was, however, a condition against an increase of risk.[589] If the description is made a warranty, and the property is described as a grist-mill, it is held that it must not be used for other purposes.[590] In another case the business carried on was described as the manufacture of bath tubs. On adjoining premises the insured also conducted the business of sawing and planing lumber, and the shavings therefrom were carried by a tube to feed the boiler furnace on the insured premises; it was held that this did not amount to a carrying on of the business of sawing and planing lumber on the insured premises.[591]

[585] See sec. 1987, herein.

[586] United States F. & M. Ins. Co. v. Kimberly, 34 Md. 224; 6 Am. Rep. 325.

[587] Wood v. Hartford Ins. Co., 13 Conn. 533; 35 Am. Dec. 92.

[588] Boardman v. Merrimack Ins. Co., 8 Cush. (Mass.) 583.

[589] Stokes v. Cox, 1 Hurl. & N. Ex. 320.

[590] Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio (N. Y.), 75.

[591] Keeney v. Home Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60.

§ 2107. Use and Occupation—Manufactory—Incidental Uses.[592]—If a manufactory is insured as used for a certain kind of business, this will, as a rule, include therein such things as are incidental to and reasonably necessary for carrying on the business; as where a building was described as used for the manufacture of lead pipe, the manufacture of reels for coiling the same is within the use,[593] although the question whether the use is such an incident of the business as to be included therein, may be a question for the jury. This was so held where the application contained the question "for what purpose the building was used," and the answer was, "Tobacco pressing; no manufacturing;" but the evidence showed that in a shed attached to the main building tobacco hogsheads were manufactured.[594]

§ 2108. Use and Occupation—Running Factory Nights.[595]—In a Maine case the question was asked, "during what hours is the factory worked?" and it was stated in answer thereto that it was worked during certain specified hours up to 7 P. M., summer and winter, "short time now." The factory was thereafter run all night for a certain time, when the insurer's agent, with knowledge of the facts, consented for an additional premium that the same might be continued, and the case was decided upon this point, such act being held a waiver, but the court, although expressly saying that it was unnecessary to determine whether the running all night unattended with loss operated to forfeit the policy, nevertheless declared that it might be fairly inferred that it was expected that the factory would be run nights at times.[596]

§ 2109. Use and Occupation—Stores—Storehouse—Storage.[597]—If the building is described as used in a cer-

[592] See sec. 1987, herein.

[593] Collins v. Charlestown Mut. F. Ins. Co., 10 Gray (Mass.), 155.

[594] Sims v. State Ins. Co., 47 Mo. 54; 4 Am. Rep. 311.

[595] See sec. 1987, herein.

[596] North Berwick Co. v. New England etc. Ins. Co., 52 Me. 336. See sec. 2239, herein.

[597] See sec. 1987, herein.

tain part for stores, it is not necessary that all of said part should be so occupied; a substantial compliance is sufficient.[598] The words "occupied as a storehouse" are a warranty, and must be complied with, and if occupied for any other purpose the contract will be void,[599] although the clause "used for the storage of ice" is merely descriptive of the business ordinarily carried on in the building, and not a warranty that ice is then stored therein at that time.[600]

§ 2110. Use and Occupation—Stores—When Continuing Warranty.[601]—A statement that the lower part of the building is occupied for stores is not a continuing warranty, but only that it is at the time so occupied, and, if then false, the policy is avoided, but a warranty that the upper portion of the building is "to remain unoccupied during the continuance of the policy" is a promissory or executory warranty, a non-compliance with which at any time during the existence of the policy will operate to avoid it, whether material to the risk or not.[602]

§ 2111. Use and Occupation—Tenants—Continuing Warranty.[603]—In the absence of an express stipulation to the contrary, a change of tenants has no effect on the contract of insurance on a dwelling-house if the use be not changed,[604] and even though the then tenant was careful and prudent,

[598] Carter v. Humboldt etc. Ins. Co., 17 Iowa, 456. See, also, Peoria M. & F. Ins. Co. v. Perkins, 16 Mich. 380.

[599] Wall v. East River Mut. Ins. Co., 3 Seld. (7 N. Y.) 370; 3 Duer (N. Y.), 264.

[600] Dolliver v. St. Joseph F. etc. Co., 131 Mass. 39.

[601] See sec. 1987, herein.

[602] Stout v. City F. Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539.

[603] See sec. 1987, herein.

[604] Cumberland etc. Co. v. Douglass, 58 Pa. St. 419; 98 Am. Dec. 298. In this case the court said: "And if a building be insured as an 'occupied dwelling-house,' it is a matter of description rather than a stipulation affecting its use. So it is greater or less in case of tenancy by different persons, but in the absence of express stipulation to the contrary, a change of tenants will not affect the contract if the use be not changed."

and the substituted tenant grossly negligent, the policy is not avoided by the change, as this is not in itself a technical increase of risk.[605] If it be warranted that a vacant house will be occupied by a tenant, and the policy states no certain time within which the warranty is to be performed, it is sufficient if it is complied with in a reasonable time.[606] Although the statements are made warranties, and the answer to the question, "For what is the building used and how many tenants are there?" is merely "Dwelling," it is doubtful whether this constitutes a warranty that it is then occupied. The question as to tenants being unanswered, the most that could be implied from the answer is that it is used as a dwelling, and if the agent or insurer who filled out the application had knowledge that it was not so used, such agent's knowledge estops the insurer.[607]

§ 2112. Watchman on Premises—Watch-clock—Sleeping in Store—Continuing Warranty.[608]—If the statement that a watchman is kept at certain times or during the night, or constantly, is made a warranty, it is a continuing warranty,[609] but such a construction is not favored where any other reasonable one can be given, especially where words are used in the present tense.[610] So although a clerk sleeps in the store at the time of effecting the policy, one need not necessarily continue to sleep there unless the policy so provides, or unless it be shown that the rate of premium was affected thereby, or that the insurer was prejudiced by the fact that a clerk did not

[605] Gates v. Madison Co. Mut. Ins. Co., 1 Seld. (N. Y.) 469; Lyon v. Commercial Ins. Co., 2 Rob. (La.) 266; Hobson v. Wellington Ins. Co., 6 U. C. 356. See sec. 2223, post, as to change of occupancy.

[606] Hough v. C. F. Ins. Co., 29 Conn. 10; 76 Am. Dec. 581; Herrick v. U. M. F. Ins. Co., 48 Me. 558; 77 Am. Dec. 244.

[607] Alexander v. Germania Ins. Co., 5 Thomp. & C. (N. Y.) 208; 2 Hun (N. Y.), 655.

[608] See sec. 1987, herein.

[609] Blumer v. Phœnix Ins. Co., 48 Wis. 535; 33 Am. Rep. 830; 45 Wis. 622 (one judge dissenting); Ripley v. Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362.

[610] Virginia F. & M. Ins. Co. v. Buck, 88 Va. 517; 13 S. E. Rep. 973; Albion Lead Works v. Williamsburg City F. Ins. Co., 2 Fed. Rep. 479.

sleep there at the time of the loss.[611] But it is held that an answer to the question whether a watchman is employed on the premises during the night is a representation material to the risk, which must be regarded as obligatory on the insured.[612] The form of the question and answer and the character of the risk must necessarily be important in connection with the stipulations of the policy. Usage also of what is done in similar establishments is held admissible.[613] If a watchman sleeps at night so far away that he cannot see the mill, he cannot be said to be a night watchman kept in the mill;[614] but the employment of a watchman, as a rule, fulfills the requirement that one be employed on the premises, day and night, and the policy is not avoided by the fact that he was sixty-five feet away at the time of the fire, where he was engaged in watching the property from a point which afforded a better view of the premises than if he had been in the mill.[615] A man employed to watch in the daytime, and who is permitted to sleep at night, is not a watchman at night within the meaning of a fire insurance policy providing that a "watchman shall be employed by the insured, to be in and about the premises day and night."[616] If the watchman is still on duty when the business of the factory is suspended, there is no forfeiture, even though discontinuing the operation of the factory is conditioned to work a forfeiture.[617] So where the words were "watchman on premises at night," it was held merely an affirmative warranty relating to the time

[611] Grubbs v. Virginia F. & M. Ins. Co. (N. C.) 1892), 14 S. E. Rep. 516.

[612] Sheldon v. Hartford etc. Ins. Co., 22 Conn. 235; 58 Am. Dec. 420.

[613] This was so held where the policy was upon a machine shop. It was also held in the same case that a statement that a watchman is kept on the premises does not require one to be constantly kept there, but only that he be employed at such times as men of ordinary care and skill would deem necessary under the circumstances: Crocker v. People's Mut. F. Ins. Co., 8 Cush. (Mass.) 79.

[614] Wenzel v. Commercial Ins. Co., 67 Cal. 438.

[615] Sierra M. S. & M. Co. v. Hartford F. Ins. Co., 76 Cal. 235; 18 Pac. Rep. 267.

[616] Rankin v. Amazon Ins. Co., 89 Cal. 203; 23 Am. St. Rep. 460.

[617] American F. Ins. Co. v. Brighton etc., 125 Ill. 131; 17 N. E. Rep. 771.

of the application, and the fact that the watchman was away on the night of the fire constituted no defense, the insured having no knowledge thereof.[618] "During the night" means throughout the night when used in connection with keeping a watchman.[619] So the answer that "there is a watchman nights," is held in New York to mean every night, and the warranty is broken and the policy annulled if no watch is kept from twelve o'clock Saturday night till twelve o'clock Sunday night.[620] And the same decision was given in Connecticut, where the statement was, "There is a watchman nights; no clock; bell is struck every hour." [621] Although in another Connecticut case the answer, "There is a watchman nights," given to the question, "Is there a watchman, etc., during the night?" was held a material representation requiring substantial performance.[622] The temporary absence of a watchman in a matter directly in the line of his duty, where he immediately returns, is not a breach of the requirement that a watchman be kept about the premises,[623] but it is a question for the jury whether a temporary absence from an insured boat lying in port, the watchman going on shore to get a meal, is in accordance with a custom so to do, no meals being cooked on board ship.[624] Where a vessel was stipulated to be in charge of a watchman, it was held a question for the jury whether there was a sufficient compliance where the watchman was employed to watch this and other vessels, and was in a yard near by where the vessel lay.[625] One who sleeps on the premises is not a watchman kept there at night.[626] But where the question as to a watch being kept during the night

[618] Virginia F. & M. Ins. Co. v. Buck, 88 Va. 517; 13 S. E. Rep. 973.

[619] Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309.

[620] Ripley v. Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362. But see Ripley v. Astor Ins. Co., 17 How. Pr. (N. Y.) 244.

[621] Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309.

[622] Sheldon v. Hartford F. Ins. Co., 22 Conn. 235.

[623] Au Sable Lumber Co. v. Detroit M. Mut. F. Ins. Co. (Mich. 1892), 21 Ins. L. J. 311; 50 N. W. Rep. 870.

[624] Gibson v. Farmers' & M. Ins. Co., 1 Cin. Sup. Ct. 410.

[625] Plyer v. German-American Ins. Co., 1 N. Y. St. Rep. 395.

[626] Brooks v. Standard F. Ins. Co., 11 Mo. App. 349.

was answered, "None, except people working in the mill during the night," this was held not to be a warranty that there should be a watch or that men should always be at work at night.[627] The term "good watch kept" will be construed to mean a suitable or proper watch, and the question whether such a watch is kept is for the jury.[628] The question is whether a watchman was employed and acted as such. The amount paid him is immaterial,[629] and it is not material to the fact whether a watchman is kept that he is not called a watchman.[630]

[627] Prieger v. Exchange etc. Ins. Co., 6 Wis. 89. But see Blumer v. Phœnix Ins. Co., 48 Wis. 535; 33 Am. Rep. 830; 45 Wis. 622 (one judge dissenting.)

[628] Parker v. Bridgeport Ins. Co., 10 Gray (Mass.), 302.

[629] Virginia F. & M. Ins. Co. v. Buck, 88 Va. 517; 13 S. E. Rep. 973.

[630] Au Sable Lumber Co. v. Detroit M. Mut. F. Ins. Co., 89 Mich. 407; 21 Ins. L. J. 311; 50 N. W. Rep. 870.

CHAPTER XLVII.

NEUTRALITY AND NATIONAL CHARACTER.

§ 2122. Warranty of neutrality—Generally.
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§ 2124. Neutral property defined: Who is a neutral: Domicile.
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§ 2143. Carrying contraband goods: Contraband of war: Breach of neutrality.
§ 2144. Breach of neutrality from resistance to lawful right of search.

§ 2122. Warranty of Neutrality—Generally.[1]—In time of maritime war it has been customary for the assurer to re-

[1] In this chapter the English admiralty cases are frequently cited. The decisions of Sir William Scott, who was appointed judge of the

quire a warranty of neutrality, or that the ship or goods insured are neutral property when a neutral desired to effect a policy thereon, or some representation was made that the property belonged to a subject of a neutral state, or was neutral, which is the same as a warranty of neutrality.[1a] Although such a warranty is generally expressed in the policy by proper words, it is declared if the insurance is effected by a resident neutral on his own property, that the neutral character at least of the vessel, if not the cargo, may be necessarily inferred, and, although there is no express warranty or representation, the assured impliedly stipulates that he will preserve his property and conduct the voyage insured in a neutral condition and character.[2] This rule was applied where the shipowner effected a policy on freight, and did not disclose the fact known to him that the goods were neutral, no inquiry being made by the insurer. The freight was lost by reason of the fact that false papers were used to disguise the national character of the cargo;[3] otherwise, had no false papers been used, it is not clear what interest the insurer on freight has in knowing the national character of the cargo, as freight is usually paid by the captors.[4] So it is held that the insured is not bound to anticipate a capture and condemnation in violation of the law of nations, and is under no obligation to communicate facts and circumstances from which such capture and condemnation might be apprehended, unless they are such as to create so general an impression of danger as must enhance the premium of insurance; but a knowledge of facts

high court of admiralty in 1798, so far as they are an exposition of the general principles of national law, are adopted and relied on by the federal courts, and Chancellor Kent declares that the decisions of the supreme court of the United States evidence that "the authority of that eminent judge stood as high at Washington as it does at Westminster": Griswold v. Waddington, 16 Johns. (N. Y.) 468.

[1a] Lothian v. Henderson, 3 Bos. & P. 499; Watton v. Bethune, 2 Brev. (S. C.) 453; 4 Am. Dec. 597; Baring v. Christie, 5 East, 398; Barring v. Claggett, 3 Bos. & P. 201; Goix v. Low, 1 Johns. Cas. (N. Y.) 341.

[2] Stocker v. Merrimack Ins. Co., 6 Mass. 220, per Sewall, J.

[3] See The Rising Sun, 2 Rob. 104.

[4] See The Atlas, 3 Rob. 304, n.

and circumstances of the latter description is not to be presumed against the insured; and although he may be aware that certain circumstances may become ground of condemnation in violation of the law of nations, there is no implied warranty that they do not exist in relation to the property insured.[5] An exception in a policy of insurance against any loss arising from the violation of existing laws or regulations of belligerent nations restricting neutral commerce, does not cover a loss occurring from the violation of any decree subsequently made.[6]

§ **2123. Object and Meaning of this Warranty.**—The object of this warranty is to apprise the insurer of the character of the property and to exclude the risk of belligerent capture. The general warranty has only in view a breach of neutrality under the laws of nations and subsisting treaties, and the engagement of the assured is that the property is neutral for the purpose of being protected, and that no act of the owner or his agents will be committed during the voyage insured constituting a breach of neutrality, and that the ship will be furnished with all necessary documents and papers to establish such neutrality, if questioned, as required by the law of nations and subsisting international treaties;[7] for the assured is bound not only to maintain the property as neutral, but to so conduct himself toward the belligerent parties as not to forfeit his neutrality. A warranty of neutrality will be broken by unneutral conduct of the assured.[8] Notwithstanding the object of this warranty, there are cases in which, although it may be fulfilled, yet the property insured may nevertheless be subjected to loss from seizure by a belligerent; as where goods of an enemy are carried,[9] or there is a breach of an arbitrary ordinance of a belligerent.[10] In warranting

[5] Marsh v. Muir, 1 Brev. (S. C.) 134; 2 Am. Dec. 648.

[6] Wood v. N. E. Ins. Co., 14 Mass. 31; 7 Am. Dec. 182.

[7] Smith v. Delaware Ins. Co., 3 Wash. (C. C.) 127; Galbraith v. Gracie, 1 Wash. (C. C.) 219.

[8] Cleveland v. Union Ins. Co., 8 Mass. 308; Schwartz v. Insurance Co. of North America, 3 Wash. (C. C.) 117.

[9] See Barker v. Blakes, 9 East, 283.

[10] See Mayne v. Walter, 3 Doug. 79.

the property to be neutral, this will be construed to mean a warranty only that the interest of the insured is neutral; the fact that another who is interested in the cargo is a belligerent does not falsify the warranty where his interest is not insured.[11] But if a part of the interest insured is owned by a belligerent, or if the entire interest is so owned, in consequence of which the risk is increased, the warranty is falsified, and this rule applies where the interest of the belligerent is merely an equitable one, or an interest as cestui que trust.[12]

§ 2124. Neutral Property Defined—Who is a Neutral—Domicile.—Neutral property, within the meaning of the warranty of neutrality or of neutral ownership, is that which belongs to the subject of a neutral state; that is, a state at amity with the belligerent powers, or the property of one who, for the purposes of trade or commerce, has his domicile in the neutral state and has obtained the commercial character, and is entitled to the privileges of a neutral.[13] We have seen that the fact that one is a citizen of a neutral state does not, as a rule, make his property neutral if he is a resident of a belligerent country,domiciled there for commercial purposes;[14]for if a neutral engages in commerce in an enemy's country on the same footing and advantages, and subject to the same protection and benefits, as native resident subjects, his property so employed becomes incorporated into the general commerce of the hostile country, and therefore liable to confiscation, without regard to his citizenship, for he cannot carry on a substantially

[11] Livingston v. Maryland Ins. Co., 6 Cranch (U. S.), 274. The interest of the belligerent was in the profits of the cargo. See Barker v. Blakes, 9 East, 283; Bayard v. Massachusetts F. & M. Ins. Co., 4 Mason (C. C.), 256.

[12] Murray v. United Ins. Co., 2 Johns. Cas. (N. Y.) 168; Bayard v. Massachusetts F. & M. Ins. Co., 4 Mason (C. C.), 256. See Galbraith v. Gracie, 1 Wash. (C. C.) 219; Price v. Dupeau, 1 Brev. (S. C.) 452.

[13] Tabbs v. Bendelack, 3 Bos. & P. 207, n.; 4 Esp. 108; reported in 1 Marshall on Insurance, ed. 1810, *386; Wilson v. Maryatt, 8 Term Rep. 31; reported in 1 Marshall on Insurance, ed. 1810, *68.

[14] See secs. 296-99, herein; McConnell v. Hector, 3 Bos. & P. 113; Tabbs v. Bendelack, 4 Esp. 108, per Lord Kenyon; 3 Bos. & P. 207; The President, 5 Rob. 277; The Antonia Joanna, 1 Wheat. (U. S.) 159; The Citto, 3 Rob. 41. See O'Meally v. Wilson, 1 Camp. 481.

hostile commerce and have the immunity and advantages of a strictly neutral character.[15] If a neutral has partners residing in a belligerent country, a warranty of neutral ownership will be falsified as to trade with the hostile firm, and if a neutral has a commercial establishment in a belligerent state during war, the same rule applies to the hostile trade.[16] But such merchant may also have a neutral domicile for commercial purposes, which will impress goods owned by him with the neutral character, and the above rule will not apply to goods of an owner notwithstanding he may also have a commercial establishment in the belligenent state.[17] An established domicile in the United States for the purpose of commerce makes the property American, for, in respect to the trade in which such resident is engaged, he is a citizen of this country, even though a foreign subject and not naturalized.[18] But a residence from 1811 to 1813 in this country, at which latter date the insurance was effected, was held not to support a warranty that the property was Swedish, the presumption of permanent residence and domicile here not being repelled by proof.[19] A hostile national character may impress itself upon the trade and property of one by reason of his habitual employment in the navigation of the hostile state; as in the case of a master or mariner so employed, and this without regard to the question of domicile, but it may be proven, however, to have acquired another and distinct national character.[20] We have further considered the question of domicile

[15] See The San Jose Indiano, 2 Gall. (C. C.) 286, per Story, J.; The Antonia Joanna, 1 Wheat. (U. S.) 159; The Danons, 4 Rob. 255, n. See The Venus, 8 Cranch (U. S.), 253; The Nayade, 4 Rob. 251; The Vigilantia, 1 Rob. 1. See secs. 296-99, herein.

[16] See Arnold v. United Ins. Co., 1 Johns. Cas. (N. Y.) 363; The Indiano, 2 Gall. (C. C.) 268; Elbers v. United Ins. Co., 16 Johns. (N. Y.) 128; The Dree Gebroeders, 4 C. Rob. 235; The Vigilantia, 1 Rob. 1; The Antonia Joanna, 1 Wheat. (U. S.) 159; The Franklin, 6 Rob. 127.

[17] See The Herman, 4 Rob. Adm. 228; The Portland, 2 Rob. 41.

[18] Bill v. Reid, 1 Maule & S. 726; Johnson v. Ludlow, 2 Johns. Cas. (N. Y.) 481; Wilson v. Marryatt, 8 Term Rep. 31; The Neptunus, 6 Rob. 408; The Matchless, 1 Hagg. 103.

[19] Elbers v. United Ins. Co., 16 Johns. (N. Y.) 128.

[20] The Embden, 1 Rob. 16; cited in 1 Duer on Marine Insurance, ed. 1845, 526, sec. 43.

under a prior chapter, to which we refer.[21] If the owner is a neutral or even a subject, but possesses an estate within belligerent colonial territory, the produce therefrom is impressed by the hostile character of the territory, and is liable to capture in transitu if shipped therefrom. In such case the property is not of neutral origin;[22] but if the voyage is not entire and direct from the colonial port of loading to a belligerent port, there may be a bona fide importation to a neutral port and exportation thence. What constitutes a bona fide importation and transshipment, and not an entire voyage from the hostile port to the mother country, rests upon the particular facts in evidence, although landing the cargo is not, it seems, absolutely necessary.[23] And even if a neutral could not lawfully carry on a trade between the mother country of a belligerent and its colonies, which was not allowed to such neutral in time of peace, yet the penalty of forfeiture can attach only during the existence of such unlawful trade, which cannot affect or

[21] See c. xi, herein; The Herman, 4 Rob. Adm. 228; The Portland, 3 Rob. Adm. 41.

[22] Thirty Hogsheads of Sugar v. Boyle, 9 Cranch (U. S.), 191. In this case Mr. Chief Justice Marshall said: "The acquisition of land in the Danish colony bound him (the plaintiff) to the fate of that colony. When the colony became British, the soil and its unsold produce became British, and the general commercial or political character of the plaintiff could not affect this transaction. Although as a Dane he was an enemy of Great Britain, yet, as proprietor of land in one of her colonies, he was no enemy and could ship his produce to her in safety from her cruisers" (and at the risk of ours who were then at war with her). See, also, The Vrow Catharina, 5 Rob. 161; The Phœnix, 5 Rob. 25. And this is true even though such produce be shipped in time of peace, unless it be delivered while peace exists. "By reason," says Sir William Scott in The Vrow Anna Catharina, 5 Rob. 161, "that the proprietor has incorporated himself with the permanent interests of the nation, and is to be taken as a part of it independent of his own personal residence or sympathies": The Phœnix, 5 Rob. 25; The Rensburg, 4 Rob. Adm. 121.

[23] The William, 5 Rob. 349; The Polly, 2 Rob. 361; The Essex, 5 Rob. 369; The Maria, 5 Rob. 365. See 1 Duer on Marine Insurance, ed. 1845, 217-725, where this rule is considered, it being in effect a modification of the "rule of 1756," which prohibited neutrals from carrying on the coasting or colonial trade of the enemy in time of war from which they were excluded in peace: 1 Duer on Marine Insurance, 699-717, 763, 770. Examine, also, appendix, 1 Wheat. (U. S.) 507; 1 Kent's Commentaries, 15th ed., 85, n.; 17 & 18 Vict., c. 5. See, also, sec. 2134, herein.

vitiate a subsequent lawful voyage.[24] If the goods are warranted American, it is not a breach of warranty that the goods are not exported by the importers where the vessel has on board a certificate of origin of a belligerent colony, it being a document in the course of trade without which the cargo would not be admitted to entry.[25]

§ 2125. **Warranty True when Made not Forfeited by Subsequent Hostilities.**—The warranty, if true when made, is not falsified by the fact that by reason of subsequent hostilities arising the property ceases to be neutral in character. Future war is at the insurer's risk, but if the warranty is false when made, the policy has no inception.[26]

§ 2126. **Warranty of Neutrality as Affected by Barratry.**—If there be a warranty of neutrality and the policy binds the underwriter to answer for the barratry of the master, the warranty implies that the neutral character shall not be forfeited by any acts of the insured or his agents, except only those amounting to barratry.[27]

§ 2127. **Documents, Papers, etc., Required.**—A warranty of neutrality or neutral ownership implies that there shall be on board ready for use every document and paper which is necessary, in accordance with the laws of nations and subsisting international treaties, to prove its neutral or national character. The ship must be navigated not only according to the law of nations, but also according to the particular treaties subsisting between the country to which she belongs and other countries,[28] and the assured can never be surprised by the

[24] Kemble v. Rhinelander, 3 Johns. Cas. (N. Y.) 130.

[25] Le Roy v. United Ins. Co., 7 Johns. (N. Y.) 343.

[26] Salucci v. Johnson, 4 Doug. 232; Park on Insurance, 364; Tyson v. Gurney, 3 Term Rep. 477; 1 Marshall on Insurance, ed. 1810, *387.

[27] Wilcocks v. Union Ins. Co., 2 Binn. (Pa.) 574; 4 Am. Dec. 480.

[28] Barzillai v. Lewis, 3 Doug. 126; Blagge v. New York Ins. Co., 1 Caines (N. Y.) 549; Liffkin v. Lee, 2 Bos. & P. N. R. 484; Murray v. Alsop, 3 Johns. Cas. (N. Y.) 97; Coolridge v. New York Firemen's Ins. Co., 14 Johns. (N. Y.) 308; Schwartz v. Insurance Co. of North America, 6 Binn. (Pa.) 378; Ludlow v. Union Ins. Co., 2 Serg. & R.

want of the proper documents, except by his own neglect or fault.[29] While certain documents may evidence neutrality, it is held not necessary that all of such documents should be on board. It is sufficient that the vessel is provided with such authenticated documents as are necessary to establish the neutrality or ownership, and that such documents be ready for use, but the want of any documents so necessary to establish the ship's neutrality will not be a compliance.[30] If by treaty between a neutral and belligerent certain documents are agreed upon as necessary to be furnished to evidence the neutral character of the ship, the warranty of neutrality is falsified if they are not furnished as agreed, nor must the ship subject herself to detention for want of such documents; but where no such treaty exists, the warranty is not falsified because the ship has been navigated contrary to particular arbitrary ordinances of which neutrals are not obligated to take notice, and which are contrary to the law of nations.[31] In times of universal peace a warranty of national character is complied with where the register is the only document on board and a duly certified copy of the original register from the office of the register of the treasury, which is re-

119; Christie v. Secretan, 8 Term Rep. 192, per Lord Kenyon. "Where the nationality or neutrality of a ship or cargo is expressly warranted, it is implied that the ship will carry the requisite documents to show such nationality or neutrality, and that it will not carry any documents which cast reasonable suspicion thereon: Deering's Annot. Civ. Code Cal., sec. 2668.

[29] Smith v. Delaware Ins. Co., 3 Wash. (C. C.) 127.

[30] See Liffkin v. Lee, 2 Bos. & P. N. R. 484; Lee Cheminant v. Allnutt, Taunt. 367, per Marshall, C. J.; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307; Blagge v. New York Ins. Co., 1 Caines (N. Y.), 549; The San Jose Indiano, 2 Gall. (C. C.) 285; Baring v. Claggett, 3 Bos. & P. 201; Griffith v. Insurance Co. of North America, 5 Binn. (Pa.) 464. "It is to be observed that though by the law of nations the want of some of these papers may be taken as strong presumptive evidence, yet the want of none of them amounts to conclusive evidence against the ship's neutrality": 1 Marshall on Insurance, ed. 1810, *408.

[31] Rich v. Parker, 7 Term Rep. 705; 2 Esp. 615; Pollard v. Bell, 8 Term Rep. 343; Mayne v. Walter, reported with the above two cases in 1 Marshall on Insurance, ed. 1810, 397, 409, 413 a.

quired by law in case of loss to be deposited in such office, is legal evidence of such register.[32] If the national character of the vessel is not made a part of the contract of insurance so as to have the force of a warranty, and there is no warranty or representation of the national character of the vessel, yet if it appears that the loss is occasioned from the want of the proper documents required to show such character, there can be no recovery under an insurance on the vessel or freight or on the goods of the owner or charterer of the vessel, for in such case the fact that the vessel is not furnished with such documents as are necessary under the law of nations and international treaties to evidence her neutral or national character and ownership operates to exonerate the insurer from the loss, and to this extent there is an implied warranty that such documents shall be on board. The rule does not apply to papers required by the arbitrary ordinances of belligerent states not binding on a neutral power, nor to the goods of a shipper having no absolute or special interest in the vessel, unless perhaps he has knowledge of the fact that by the want of such documents his property is exposed to unusual peril or increased hazard and has failed to disclose the fact. An exception would also exist, in case the risks were notwithstanding expressly covered by the policy, if there had been a full disclosure of facts and the risk had, with such knowledge by the underwriter, been assured by him.[33] It must be observed, however, that the loss must distinctly appear to have been wholly or partially caused by the want of such necessary documents, but it is not, therefore, necessary that the ship should sail with

[32] Catlett v. Pacific Ins. Co., 1 Paine (C. C.), 594.

[33] Polleys v. Ocean Ins. Co., 14 Me. (2 Shep.) 141; Bell v. Carstairs, 14 East, 374, per Lord Ellenborough; Steel v. Lacy, 3 Taunt. 285; Pollard v. Bell, 8 Term Rep. 434; Christie v. Secretan, 8 Term Rep. 1921; Hobbs v. Hemming, 34 L. J. Com. P. 117, 122; 17 Com. B., N. S., 791; Dawson v. Atty, 7 East, 367; Cleveland v. Union Mut. Ins. Co., 8 Mass. 308, Sewall, J., dissenting; Price v. Bell, 1 East, 163; Le Cheminant v. Pearson, 4 Taunt. 367; Bell v. Bromfield, 15 East, 364; Carruthers v. Gray, 3 Camp. 142; 15 East. 35; Bird v. Appleton, 8 Term Rep. 562. Examine Stocker v. Merrimack Ins. Co., 6 Mass. 220; Hornmeyer v. Lushington, 3 Camp. 85; 15 East. 46; Mayne v. Walter, 3 Doug. 79.

such documents.[34] In this connection it is declared that where the national character of a vessel is not warranted or represented, the assured need not show that she has a sea letter or other papers required by the laws of the country or by treaties with foreign nations.[35] In so far as this statement expresses a different rule from that above given, it apparently conflicts with the decisions cited on which said rule is based.[36]

§ 2128. Character of Documents and Insignia of National Character Required.—The following documents and insignia of national character are specified by Mr. Arnould as necessary: 1. The flag; 2. The passport, sea brief, sea letter, or pass; 3. The register or certificate of registry; 4. The bill of sale; 5. The muster-roll; 6. The charter-party; 7. The log-book; 8. The bill of health; 9. Proofs of the national character of the cargo, as invoices, bills of lading, certificates of origin, etc.[37] By the law of nations the flag evidences the

[34] But see 17 & 18 Vict., c. 124, sec. 122. But if the exporter shall fail to deliver to the searcher a shipping bill with duplicates thereof when required of the goods exported by him as prescribed by the Customs Consolidation Act of 1853, he shall be held liable.

[35] Elting v. Scott, 2 Johns. (N. Y.) 157. See Barnewall, 1 Caines (N. Y.), 217.

[36] But see Bell v. Carstairs, 14 East, 373, 393, per Lord Ellenborough.

[37] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 624, *623; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 626, et seq.; Wheaton on Maritime Captures and Prizes, 65, 66. Mr. Marshall enumerates them as follows: 1. The passport, sea brief or sea letter. See Anonymous, Skin. 404. "This document is indispensably necessary to the safety of every neutral ship"; 2. The proofs of property, such as a bill of sale, etc. These proofs are essential: See The Sisters, 5 Rob. Adm. 155, per Lord Stowell; 3. The muster-roll (rôle d' equipage). See Christie v. Secretan, 8 Term Rep. 192; 4. The charter-party. See Saloucci v. Johnson, reported in 1 Marshall on Insurance, ed. 1810, 419, per Ashhurst, J.; 5. The bills of lading; 6. The invoices; 7. The log-book or ship's journal; 8. The bill of health: 1 Marshall on Insurance, ed. 1810, *406, et seq. The papers required are the sea letters or passports describing and certificates containing the particulars of the cargo and place whence the ship sailed, signed by the officers of the port: Cooper's American Politics, ed. 1884, bk. v, p. 113. As to sea letters, see 6 Wheat. (U. S.) Append. 12, 36, 58; Sleight v. Rhinelander, 1 Johns. (N. Y.) 192; 2 Laws U. S., c. 339; 3 Laws U. S., c. 329.

national character of the ship, although not of the goods.[38] If a vessel is described as carrying a "Kniphausen flag," and represented as a "Kniphausen vessel," the warranty is satisfied if she is documented and navigated according to the laws of that state.[39] And where the ship was warranted Danish and she carried Danish colors, and the master conducted himself as the master of a ship of that nationality, the warranty was held satisfied.[40] A neutral ship which sails under the enemy's flag and pass is impressed with that character. The fact that such a hostile character is assumed presumes that some benefit or advantage is thereby sought, and therefore assured may not disclaim the belligerent character.[41] Neutral goods loaded on board such a ship are not, however, subject to the rule, but the neutral character and ownership may be proven where the goods are so loaded in time of peace, unless the same was done in contemplation of war, and with a design to protect them from hostile capture.[42] It is also held in this country that neutral goods may be lawfully carried on board an enemy's armed ship without being prize of war.[43] This decision is, however, criticised by Mr. Duer, on the ground that "it is a premeditated attempt to oppose, if practicable, the right of search, and to this preliminary act the full effect of

[38] The Vrow Elizabeth, 5 C. Rob. 11; The Success, 1 Dod. 132; The Vreede Scholtys, 5 C. Rob. 5, n.

[39] Von Tinglein v. Du Bois, 2 Camp. 151.

[40] Arcangelo v. Thompson, 2 Camp. 620. See Pollard v. Bell, 8 Term Rep. 343, per Lord Kenyon.

[41] The Vigilantia, 1 Rob. 13, per Sir Wm. Scott; Sleight v. Rhinelander, 1 Johns. (N. Y.) 192; The Princessa, 2 Rob. 49, per Sir Wm. Scott; The Ann, 1 Dod. 221; Schwartz v. Insurance Co. of North America, 3 Wash. (C. C.) 117; The Success, 1 Dod. 131, per Sir Wm. Scott; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307; The Ann Green, 1 Gall. 290, per Story, J.; Higgins v. Livermore, 14 Mass. 106.

[42] The Ann Green, 1 Gall. (C. C.) 286, per Story, J.; The Vreede Scholtys, 5 Rob. 5, n.

[43] The Nereide, 9 Cranch (U. S.), 388; The Atlanta, 3 Wheat. (U. S.) 409. But see The Fanny, 1 Dod. 443, per Sir Wm. Scott; Kemble v. Rhinelander, 3 Johns. Cas. (N. Y.) 130; 2 Wheaton's International Law, 260–78. The Declaration of Paris of 1856, signed by the representatives of the chief European powers, provides in section 3 that "neutral goods, except contraband of war, are not liable to capture under an enemy's flag."

actual resistance may be justly and legally imputed."[44] But the goods of a neutral may, it is admitted, be carried in a merchant or unarmed ship of the enemy, for the right of capture does not extend to the goods of a friend.[45] The presumption, however, that they are the enemy's goods must be overcome by documents showing their neutral character.[46] And a neutral ship may carry a belligerent cargo, and not by the mere fact of so doing falsify a warranty of neutrality either of the ship or of such part of the cargo as is covered by separate insurance, and is not hostile in character, unless there is an attempt to disguise and carry belligerent goods as neutral.[47] But this rule, although it permits a neutral to carry belligerent goods without a violation of belligerent rights, yet it does not protect such goods from hostile seizure and confiscation, and subjects the vessel not only to detention, but it may also be carried into the captor's port to unload the goods. The custom is to then release the vessel, and in such case freight is usually paid by the captors, as the goods, being enemy's goods, a delivery to the captor is in effect a delivery to the consignee for the purpose of freight, unless the right to freight is destroyed by carrying false papers or by the suppression of papers.[48] It is held that if the government, for the purpose of protecting from its cruisers the ship of another state, grants it a passport, this does not violate the laws of neutrality, nor impress the ship with the national character of the government from whom the passport is obtained.[49] Where the treaty be-

[44] 1 Duer on Marine Insurance, ed. 1845, 731, 732, relying on opinion of Story, J., in The Nereide, 9 Cranch (U. S.), 388.

[45] The Fanny, 1 Dod. 448; 1 Duer on Marine Insurance, ed. 1845, 732.

[46] See The Flying Fish, 2 Gall. (C. C.) 374.

[47] Barker v. Blakes, 9 East, 283; Schultz v. Insurance Co. of North America, 3 Wash. (C. C.) 117; Phœnix Ins. Co. v. Pratt, 2 Binn. (Pa.) 308. See The Nereide, 9 Cranch (U. S.), 388, per Marshall, C. J.

[48] 2 Wheaton's International Law, 160; The Atlas, 3 Rob. 304, n.; The Emanuel, 1 Rob. 296; 1 Duer on Marine Insurance, ed. 1845, 530-33. The Declaration of Paris of 1856, signed by the representatives of the chief European powers, provides in section 2 that "the neutral flag covers enemy's goods with the exception of contraband of war."

[49] Hallett v. Jenks, 1 Caines Cas. (N. Y.) 43; 3 Cranch (U. S.), 210. See Bulkley v. Derby Fishing Co., 1 Conn. 571; Hayward v. Blake,

tween France and America of 1778 required that all ships belonging to the subject of either ally should be furnished with passports or sea letters expressing the name, property, and bulk of the ship, and the name and place of habitation of her master, and that such passport should be exhibited, etc., and the ship sailed from London to Guernsey, England then being at war with France, it was held that a warranty of American property was falsified by the ship not having such passport on board, and that a ship which, for want of a necessary document, subjects herself to detention forfeits her neutrality, even though the fact is that she is American property.[50] Where there was a warranty that the ship was American, and the proof was of American ownership, and the vessel had all the necessary papers except a register, having sailed with a sea letter only, this was held to be a sufficient evidence of a compliance with the warranty.[51] If a ship is warranted American property, and it is represented that she sails under a sea letter or certificate, and that her out cargo is wholly or partly contraband of war, the warranty is not satisfied unless she is neutral for all purposes and properly documented as such, and will so conduct herself as a neutral as not to violate the laws of neutrality.[52] An insurance on a "British brig" is not a warranty that she is British registered, but applies to her ownership, and is satisfied prima facie where she is navigated under a clearance and license from the British custom-house at New Providence, and is owned by a British subject.[53] A copy of the ship's register, unless authenticated by the oath of a witness who has seen the original, is held no evidence that

12 Mass. 176. But see The Julia, 8 Cranch (U. S.), 181; 1 Gall. (C. C.) 605; The Ariadne, 2 Wheat. (U. S.) 143; Ogden v. Barker, 18 Johns. (N. Y.) 87.

[50] Rich v. Parker, 7 Term Rep. 705; 2 Esp. 615, reported in 1 Marshall on Insurance, ed. 1810, *409.

[51] Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307; 5 Am. Dec. 339. See Sleight v. Rhinelander, 2 Johns. (N. Y.) 531; reversing 1 Johns. (N. Y.) 192; Griffith v. Insurance Co. of North America, 5 Binn. (Pa.) 464.

[52] Schwartz v. Insurance Co. of North America, 6 Binn. (Pa.) 378.

[53] Mackie v. Pleasants, 2 Binn. (Pa.) 363. See, also, Griffith v. Insurance Co. of North America, 5 Binn. (Pa.) 464.

the ship is American, although the copy is certified by the collector;[54] but a copy certified by the registrar of the treasury department where the original register is filed, coupled with a certificate under the department seal that he is a registrar, is evidence.[55]

§ 2129. Description in Policy or Representation as to National Character.—If the vessel is described in the policy or is represented as an American or British, etc., ship, it is equivalent to a warranty of national character.[56] So where a policy of insurance was effected upon a vessel represented to be American, and furnished with American papers, but in reality owned by Spanish subjects, which fact was not disclosed to the insurers, the policy was held void from the beginning, on the ground both of misrepresentation and concealment, and in such case the insured cannot recover, whether the loss is caused by the misrepresentation or concealment or otherwise.[57] But the representation of the insured that the cargo is American is not falsified by the vessel's carrying the baggage of French passengers.[58] If the vessel be described in the policy as a prize vessel, and afterward her national character is changed so as to increase the risk, this discharges the underwriters.[59] If a ship is described or warranted as of a particular national character, this does not mean merely that she is so built, but that she is entitled to all the privileges and immunities to which a ship of the national character specified is entitled.[60]

[54] Coolidge v. New York Firemen's Ins. Co., 14 Johns. (N. Y.) 308.

[55] Catlett v. Pacific Ins. Co., 4 Wend. (N. Y.) 75; affirming 1 Wend. (N. Y.) 561.

[56] Vandenhewel v. Church, 2 Johns. Cas. (N. Y.) 173. n.; Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404; Higgins v. Livermore, 14 Mass. 106; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307; Atherton v. Brown, 14 Mass. 152; Murray v. United Ins. Co., 2 Johns. Cas. (N. Y.) 168; Lewis v. Thatcher, 15 Mass. 432.

[57] Price v. De Peau, 1 Brev. (S. C.) 452; 2 Am. Dec. 680.

[58] Vasse v. Ball, 2 Yeates (Pa.), 178.

[59] Seamans v. Loring, 1 Mason (C. C.), 127.

[60] Rich v. Parker, 7 Term Rep. 705; 2 Esp. 615, per Ashhurst, J., reported in 1 Marshall on Marine Insurance, ed. 1810, *411.

§ 2130. Goods Shipped from a Neutral to a Belligerent.—Goods shipped during war or during peace in contemplation of war from a neutral to a belligerent, to become his property on arrival, are impressed from the commencement of the voyage with the hostile character of the consignee, and are subject during the voyage to capture and confiscation, and this rule is not affected by usage to the contrary, nor by any special agreement which in effect would evade the operation of the law, such agreement being held fraudulent. Goods so shipped falsify a warranty of neutral property. The rule also applies to goods contracted in good faith to be shipped during peace, but not shipped until after war is declared, although if shipped bona fide during peace, and subsequent hostilities arise, the neutral ownership of the goods remains unchanged till delivery, and the rule does not apply.[61] This rule is, however, subject to such exceptions as may arise from the exercise of the right of stoppage in transitu.[62]

[61] The Venus, 8 Cranch (U. S.), 275; The Ann Green, 1 Gall. (C. C.) 291, per Story, J.; The Anna Catharina, 4 Rob. Adm. 107, per Sir Wm. Scott; The Francis, 1 Gall. (C. C.) 450, per Story, J.; The Vrow Margaretha, 1 C. Rob. 336; The Jan Frederick, 4 Rob. 107; The Atlas, 3 Rob. 299; The De Biboa, 2 C. Rob. 134; The Staadt Embden, 1 C. Rob. 26, n.; The Ringende Jacob, 1 C. Rob. 89; The Sally Griffiths, 3 C. Rob. 303. But see De Wolff v. New York F. Ins. Co., 2 Cow. (N. Y.) 56; 20 Johns. (N. Y.) 214; Ludlow v. Bowne, 1 Johns. (N. Y.) 1; 3 Am. Dec. 277. In this last case a policy of insurance was effected on goods from New York to France, warranted as American property. The goods were purchased and shipped in an American vessel by American merchants to French merchants, under an agreement that the former were to deliver the goods at St. Vallery, for which they were to be allowed a certain commission, taking on themselves all risks; the consignees were to pay the freight on delivery and also for the amount of cargo, in bills on London, guaranteed by a commercial house in that city. During the voyage the goods were captured by the British and condemned as French property. It was held that the property of the goods remained in the consignors until delivery in France, and that the warranty in the policy was not broken in regard to the neutral character of the property, so as to vitiate the policy: See 1 Kent's Commentaries, 5th ed., 86, 87.

[62] See The Constantia, 6 Rob. 330, per Sir Wm. Scott; Dutton v. Solomonson, 3 Bos. & P. 582.

§ 2131. Goods Shipped from a Belligerent to a Neutral—Transfer after Capture.—Goods shipped during war or during peace in contemplation of war from a belligerent to a neutral country, if belligerent in character at the commencement of the voyage, so continue until delivery in the neutral country, and are subject to capture in transitu. But if it is clearly proven that the title to the property was acquired and was also absolutely and unconditionally vested in the neutral consignee, and the goods delivered to him or his agent at the time of shipment, the neutral character of the property continues in transitu. Less evidence is required, however, to prove the neutral character where the title is so acquired and the goods are shipped during peace and subsequent hostilities arise. If, however, the consignee is not obligated to accept the goods, as in case of an election to take them, or if the property is under the dominion or control of the consignor in transitu, it does not lose its belligerent character, for the property must be devested out of the shipper, and absolutely and unconditionally vested in the neutral consignee at the commencement of the transit.[63] A warranty of neutrality is broken by transfer on the part of the insured, after capture of a part of the subject insured, to a subject of the belligerent, for a breach as to part vitiates the whole.[64] Notwithstanding the rule first stated, it is said "that in order to constitute an effectual transfer of the property there must be either an order for the goods or an effectual acceptance of them by the consignee prior to the capture. If the capture takes place where no order has been given, and before the goods have been accepted, they must be considered as the

[63] The Frances, 8 Cranch (U. S.), 354; 9 Cranch (U. S.), 189; 1 Gall. (C. C.) 445; The Sally, 3 C. Rob. 300, n.; The Aurora, 4 Rob. 218; The Atlas, 3 C. Rob. 299; The Venus, M'Gee's claim, 8 Cranch (U. S.), 275; The Margaretha, 1 Rob. 336; The Noyd Gedacht, 2 Rob. 137; The Anna Catharina, 4 C. Rob. 107; The Carl Walter, 4 Rob. 207; The Carolina, 1 Rob. 304; The Merrimack, 8 Cranch (U. S.), 328; The Twende Venner, 6 Rob. 329, n. Examine The Danecke-baar Africana, 1 Rob. 107 (the rule stated in the text was that in England prior to the Declaration of Paris of 1856); 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 625. See, also, Maclachlan on Shipping, 560.

[64] Goold v. United Ins. Co., 2 Caines (N. Y.), 73.

property of the persons who have so consigned them." [65] Both Mr. Phillips and Mr. Duer deduce from the quoted statement an exception to the rule in substance as follows: If goods are shipped conditionally, and the neutral complies with the conditions and accepts the goods in transitu before capture, they become neutral in character from that time.[66] The principal rule first given in this section is subject to such exceptions as may arise from the exercise of the right of stoppage in transitu.[67]

§ **2132. Agreement to Claim Property as Neutral in Case of Capture.**—The agreement to claim property as neutral in case of capture is held so far legal that the insured cannot recover if he refuses to assert such claim where the property is captured, and it is no excuse that this refusal is on the ground that it would render him guilty of perjury so to do.[68]

§ **2133. Neutral Vessel Employed in Belligerent Service.**—A neutral vessel cannot, without being subject to forfeiture, engage in any service or employment of a belligerent which will aid or assist him in warding off the pressure of war, or in favoring its offensive projects. The vessel must not subject herself to the belligerent's orders, or identify herself with the interests of such belligerent. Thus, being engaged in the transport service of the enemy, or in carrying military persons in his employ, or the transportation of military stores, whether immediately connected with the active service of the belligerent or not, or the conveyance of dispatches for a belligerent, all render the vessel so engaged subject to confiscation, and all property of the owner is subject to the penalty where he is in privity or has knowledge of

[65] The Cousinne Marianne, 1 Edw. Adm. 346, per Sir Wm. Scott.

[66] 1 Duer on Marine Insurance, ed. 1845, 435, sec. 33; 1 Phillips on Insurance, 3d ed., 439, sec. 795. Examine The Francis, 9 Cranch (U. S.), 85, argument of counsel and opinion of court.

[67] The Constantia, 6 Rob. 330, per Sir Wm. Scott, and cases cited under last note under preceding section. See The Twende Venner, 6 Rob. 329, n.

[68] Coolidge v. Blake, 15 Mass. 429.

the conveyance of hostile dispatches.[69] And it is a high misdemeanor either to fit out, arm, or employ a vessel against people at peace with this country.[70] The rule does not, however, preclude carrying dispatches by a neutral vessel between an ambassador in a neutral state and his own country; although a belligerent, such act does not constitute a breach of the warranty of neutrality, nor subject the vessel to confiscation, although she may be liable to detention.[71] One marked distinction, however, seems to be made between the cases of carrying dispatches of a belligerent and other belligerent employment, and that is, that in the former case the knowledge of the owner or of the master is an important factor, since the mere fact of belligerent dispatches being on board does afford a ground for enforcing the penalty where no knowledge of the fact exists on the part of the owner or master, while in other cases of belligerent employment it has been held that the ignorance or knowledge or privity of the master or owner is an immaterial matter.[72]

§ 2134. May Neutrals Avail Themselves in Time of War of a Trade Prohibited During Peace?—In England, what was known as the rule of 1756 prohibited neutrals during war to engage in a colonial or coasting trade of a belligerent state, from which they were excluded in time of peace;[73]

[69] The Commercen, 1 Wheat. (U. S.) 382, per Story, J.; The Atalanta, 6 Rob. 440, 454, per Sir Wm. Scott; The Friendship, 6 Rob. 420, per Sir Wm. Scott; The Carolina, 4 Rob. 256; The Rapid, 1 Edw. 228; The Orozembo, 6 Rob. 430, per Sir Wm. Scott.

[70] The Monte Allegro, 7 Wheat. (U. S.) 298; The Estrella, 4 Wheat. (U. S.) 298; United States v. Rayburn, 6 Pet. 352; The Salvador, L. R. 3 P. C. App. Cas. 218; United States v. Guinet, 2 Dall. (U. S.) 321. But see The Betsey, Bee, 71. For other reasons relating to this point see The Gran Para, 7 Wheat. (U. S.) 471; United States v. Quincy, 6 Pet. (U. S.) 445; The Bello Corrunes, 6 Wheat. (U. S.) 152; The Santa Maria, 7 Wheat. (U. S.) 430; 3 Atty. Gen. Opin. 738. And examine Rev. Stats. U. S., sec. 5283.

[71] The Commercen, 1 Wheat. (U. S.) 382; The Madison, 1 Edw. 224; The Caroline, 1 Rob. 461, per Sir Wm. Scott.

[72] The Caroline, 6 Rob. 461; The Hope, 6 Rob. 463, n.; The Orozembo, 6 Rob. 430, per Sir Wm. Scott.

[73] In 1756, when war between Great Britain and France was declared, what was known as the Rule of 1756 was enforced. It was

for although a belligerent under an entire inability to supply his colonies in time of war affects to open them to neutrals, nevertheless it is held that it still continues a privileged trade, and that neutrals may not avail themselves of the concession, and embark in such trade without thereby identifying themselves with the belligerent and impressing the trade with such hostile character, and that in effect, by so interposing, the neutral relieves the belligerent from the condition into which the other belligerent had reduced him. This rule was subsequently modified, and was strictly enforced by English tribunals during the great maritime wars from 1792 to 1815,[74] although it was not only not admitted by the United States to be an established principle of the law of nations, but was declared to be utterly opposed thereto, and this government vigorously remonstrated, rejecting the rule and denouncing the doctrine as an unjust, arbitrary, and violent innovation. In its modified form the rule covered only the trade on a direct voyage from a colonial port of lading to the mother country,

in direct opposition to the law of nations, as well as to the principle declared by Frederick the Great, "that goods of an enemy cannot be taken from on board the ships of a friend," and in direct violation of the treaty between England and Holland: 2 Lossing's Harper's Cyclopedia of United States History, ed. 1893, 1232, tit. "Rule 1756." The French Convention, by decree, 1793, allowed to neutral vessels the privileges of French ships, and the British government refused to recognize the trade as neutral between France and her West India colonies. The rule of 1756 was revived, and British cruisers were ordered to seize and bring in all vessels loaded with breadstuffs and bound for France, even though both vessel and cargo were neutral, but, on proof of neutrality, they were not to be forfeited. The cargo was to be paid for and the vessel released on bond being given to land in countries friendly to Great Britain: Taken from 1 Lossing's Harper's Cyclopedia of United States History, ed. 1893, 160, tit., "British Interference with the Rights of Neutrals." "In 1793, the British government issued instructions to its public and private ships of war 'to detain and bring in for adjudication' all neutral vessels laden with the produce of any colony of France or carrying provisions or other supplies for the use of such colonies' ": 1 Duer on Marine Insurance, ed. 1845, 717.

[74] "And the confiscation of a vast number of American ships with valuable cargoes of colonial produce was the fruit of this decree": 1 Duer on Marine Insurance, ed. 1845, 701, 721.

and permitted a direct trade between the colonies and the neutral country, and an exportation thence to the mother country, provided the voyage of importation and exportation did not constitute one entire voyage, and the importation to the neutral country was bona fide, and not with an original intention on the part of the importer to reship the goods and thereby evade the operation of the rule.[75]

§ **2135. Vendee of Vessel.**—The fact that a vessel has been sold by a belligerent to a neutral in time of war does not impress her with a neutral character, unless the sale is absolute and the title totally divested out of the belligerent vendor, and her subsequent trade and conduct must also be of such a character as to place the transfer above the suspicion of being merely colorable and in fraud of belligerent rights. If the belligerent vendor retains a contingent interest, dependent upon the performance or nonperformance of any condition whereby the title or any interest therein is to revert to him at some future time, or if he holds a lien thereon for any

[75] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 629, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 631, et seq.; 1 Phillips on Insurance, 3d ed., 448, sec. 816; 1 Duer on Marine Insurance, ed. 1845, 699-725, 762-70, where this subject is exhaustively treated by the writer, who denies the authority of the rule, and considers and cites numerous cases and other references, among which are the following: Berons v. Rucker, 1 Wm. Black. 313, per Lord Mansfield; The Princessa, 2 Rob. 52; The Vrow Anna Catharina, 5 Rob. 15; The Rendsburg, 4 Rob. 121; Sir Wm. Scott's opinion in The Immanuel, 2 Rob. 200-4, and his argument in The Emmanuel, 1 Rob. 296; The Phœnix, 3 Rob. 186; The Joanna Tholen, 6 Rob. 72; The Rebecca, 2 Rob. 101; The Jonge Thomas, 3 Rob. 233, n.; Argument of counsel for claimant in The Wilhelmina, 4 Rob. Append. 5; The Polly, 2 Rob. 361; The Essex, 5 Rob. 369; The Maria, 5 Rob. 365; The Katharina, 5 Brown P. C., Tomlyn's ed., 328; 1 Wheat. (U. S.) Append. 507; 2 Wheat. (U. S.) Append. 29; Mr. Munroe's letter to Lord Mulgrave, Sept. 23, 1805; Mr. Madison's letter to Messrs. Monroe & Pinckney, May 11, 1806; 1 Kent's Commentaries, 5th ed., 84, 85, n.; Lord Liverpool's "Discourse on the Conduct of the Government of Great Britain"; Ward on the Rights and Duties of Belligerents and Neutrals; Mr. Stephen's pamphlet, "War in Disguise"; Mr. Madison's "Examination of the British Doctrine"; 5 American State Papers, 330, 355.

part of the purchase money, or if the vessel be employed by the neutral vendee in the enemy's trade, or continues under the control and management of the belligerent vendor, the vessel has not such a neutral character as to protect her from capture. This is in substance what has been held by the English admiralty.[76] If a vessel is transferred to an alien under such conditions that the title is not devested out of the vendor, an American citizen, as where the property, although it is to be paid for, at all events is not to be transferred until a future day, this will satisfy the warranty on the part of the vendor of American property.[77] It has also been held by the English admiralty that the absolute sale to a neutral of an armed belligerent vessel in a neutral port, in which she was forced to take refuge by the other belligerent, is not such a valid transfer as will protect her thereafter from capture, although the rule is otherwise as to a merchant ship.[78] The fact that the vendee of a vessel sold in an American port may, perhaps, use her in the service of a belligerent, is not a violation of neutrality.[79]

§ 2136. Neutrality Violated by Breach of Blockade. It may be stated as a general rule that a breach of blockade by a neutral violates his neutrality. But the blockade must be one of which notice, actual or constructive, has been given; it must also have been duly and sufficiently instituted and properly maintained, for although a belligerent has the right to exclude neutral commerce by an investment of the enemy's port with a naval force, yet such exclusion should be held operative only when done and maintained strictly in accordance with the rules of law and the right of war. In brief, there must be an actual blockade, intended to exclude all communication with

[76] The Vigilantia, 1 Rob. 1; The Noyd Gedacht, 2 Rob. 137, n.; The Endraught, 1 Rob. 18; The Vrow Herminia, 1 Rob. 163; The Lechs Geschwinstein, 4 Rob. 100; The Embden, 1 Rob. 16.

[77] Mugatroyd v. Crawford, 3 Dall. (U. S.) 491.

[78] The Minerva, 6 Rob. 399, and n.

[79] The Santissima Trinidad, 7 Wheat. (U. S.) 283; The Betsey, Bel. 67; The Meteor, 3 Am. Law Rev. 173.

the invested port, and to suspend its commerce both as to its import and export trade; it must also be properly maintained, and there ought to be some clear act of violation by the neutral.[80]

§ 2137. Notice to Neutral of Blockade Required.—There must be a knowledge of the existence of a blockade, either actual or constructive, on the part of a neutral. Actual personal notice is conclusive, without regard to its immediate source, especially where by due inquiry it might have been confirmed.[81] Again, under the English admiralty decisions and upon other high authority a blockading nation has, as a general rule, the right to conclusively presume that a notification to a neutral government is a personal notification to each subject and resident entitled to claim its neutral character and protection, and this is true as to the blockading power, irrespective of the neglect of the neutral government to make publication of the notice received.[82] It is declared, however, that the rule is open to some qualification and relax-

[80] The Juffrou Maria Schroeder, 3 Rob. 147; The Frederick Molke, 1 Rob. 86; The Webraart Van Pillau, 2 C. Rob. 128; Harratt v. Wise, 9 Barn. & C. 712, per Lord Tenterden; The Gute Edwartung, 6 C. Rob. 182; The Vrouw Judith, 1 Rob. 150, per Sir Wm. Scott; The Maria, 5 C. Rob. 365; The Haabet, 6 Rob. 58; The Mercurius, 1 Rob. 82, per Sir Wm. Scott; 1 Marshall on Insurance, ed. 1810, *80.

[81] The Tutela, 6 Rob. 177; Winder v. Wise, Dawson & Lloyd's Mercantile Cases, 238. In this case there had been a publication of the notice in the London Gazette after the captain had sailed on his voyage and an insurance on goods abroad: The Rolla, 6 Rob. 364.

[82] The Neptunas, 2 Rob. 110, and cases id. 109, 111, 131, 298; The Tutela, 6 Rob. 177; Harratt v. Wise, 9 Barn. & C. 712, per Lord Tenterden; The Adelaide, 2 C. Rob. 111, n.; 1 Kent's Commentaries, 147, et seq.; opinion of Kent, C. J., in Radcliff v. United Ins. Co., 7 Johns. (N. Y.) 38; Maclachlan on Shipping, 569, et seq.; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 744, sec. 276; 1 Phillips on Insurance, 3d ed., 457, 458, secs. 829, 830; 1 Marshall on Insurance, ed. 1810, *80; 1 Duer on Marine Insurance, ed. 1845, 648, et seq. See, also, 1 Duer on Marine Insurance, ed. 1845, 691-98, where this writer, fully examines the note to Olivera v. Union Ins. Co., 3 Wheat. (U. S.) 196, and appendix, and also reviews the authorities relied on and rejects, as not expressing the law, the rule there stated, viz., that notification to a neutral minister is not notice to his government or its citizens according to the recognized doctrine here.

ation for the furtherance of justice and the benefit of commerce; as in case the master sails on his voyage before notice is published of the blockade, and also that the presumption of knowledge from such notification is open to rebuttal in insurance cases, and it becomes a question of fact for the jury whether there was actual knowledge or not.[83]

§ **2138. Where Existence of Blockade is Notorious or has Long Continued.**—Where the fact of the existence of the blockade is so open and notoriously known at the port of departure that it may reasonably be presumed that the neutral must have been informed of its existence, he is presumed to have knowledge thereof. This rule has also been applied to a vessel seeking egress from a blockaded port with a cargo loaded after the commencement of the blockade; so to a case where notice has been given to a neighboring state, and a sufficiently reasonable time has elapsed thereafter, and also where an important commercial port has been blockaded and the hostile investment has long continued.[84]

§ **2139. What Constitutes a Blockade.**—A blockade must have been duly and sufficiently established either directly by the sovereign power, or by express or implied delegation of power, or presumably by adoption and ratification, except that where a blockade has been declared by the sovereign authority, it is thereby limited in its extent, and no discretionary power exists in the blockading force to enlarge its terms as against a neutral.[85] There must not only be an actual de facto blockade, but it must be properly maintained. It must be of such a character and be maintained by such an actually existing adequate force before the port that every vessel which attempts egress or ingress is imminently liable to capture; for it must be intended to suspend commerce with

[83] Harratt v. Wise, 9 Barn. & C. 712, per Lord Tenterden.

[84] The Vrouw Judith, 1 Rob. 150; The Adelaide, 2 Rob. 111, n., per Sir Wm. Scott; The Frederick Molke, 1 Rob. 86; The Calypso, 2 Rob. 298; The Hutige Hane Dahl, 3 Rob. 328.

[85] The Rolla, 6 Rob. 364, per Sir Wm. Scott; The Henrick, 1 Rob. 146.

the blockaded port by so far encircling it at sea that all communication is effectually cut off.[86] And no blockade exists as

[86] Radcliff v. United Ins. Co., 7 Johns. (N. Y.) 38; Williams v. Smith, 2 Caines (N. Y.), 1; 2 Am. Dec. 209; The Mercurius, 1 Rob. 67; King v. Delaware Ins. Co., 2 Wash. (C. C.) 300; The Betsey, 1 C. Rob. 93; The Vrouw Judith, 1 Rob. 150, per Sir Wm. Scott; 2 Wheaton's International Law, 228, 233; 1 Kent's Commentaries, 5th ed., 144, et seq. See Treaties of United States and Chili, 1822; United States and Peru, 1830, and July 22, 1856; United States and Russia, July 22, 1854; United States and Two Sicilies, Jan. 13, 1855; 7 Journ. Congress, 241, Dec. 1871. On May 16, 1806, England, by orders in council, declared the whole coast of Europe, from Elbe in Germany to Brest in France, in a state of blockade, when it could not spare a sufficient naval force from other points of service to enforce the blockade over more than a small proportion of the territory. On November 21, 1806, Napoleon issued the Berlin Decree, declaring the British islands in a state of blockade, although he had no naval force, in fact hardly a ship, with which to enforce the decree. This was the beginning of the "Continental System" and was in effect intended as a retatiatory measure; Great Britain, in January, 1807, by order in council, restrained trade by neutrals between belligerent ports, a commerce generally allowed prior thereto, and covered substantially the same territory as the former order, and again, on November 17, 1807, she prohibited all neutral trade between France and her allies, except through Great Britain. Napoleon's retaliatory measure, or Milan Order of December 17, 1807, and like decrees issued by Spain and Holland, declared that every vessel should be forfeited and denationalized if found on the high seas on a voyage to or from any British port, or which should submit to search by British cruisers, or which should pay any license money, tax, or duty to that government. The Berlin Decree was not at first enforced against American vessels by the French. The American minister having been informed by the French authorities that they would not be molested, but after July 7, 1807, it was announced that American vessels laden with British merchandise or the merchandise of her colonies would be seized, and in November, 1807, the American ship Horizon was actually seized and her cargo condemned as of British origin, and thereafter other American vessels and their cargoes were also seized. In the same year, Great Britain, after a formal demand for the surrender of the Danish fleet at Copenhagen, seized their vessels and took them to England, and by an order in council, November 11, 1807, she made another retaliatory order in council, prohibiting neutral trade except through Great Britain with France or her allies. The retaliatory orders in council of Great Britain were, although a plain violation of the law of nations, defended by Sir William Scott, although he had previously declared it to be "monstrous to suppose that because one country has been guilty of an irregularity every other country is let loose

to any marine channel left open.[87] Whether the fact that a port is merely besieged and not invested by sea, prevents transportation there by neutrals of goods by sea, has been questioned by Chief Justice Marshall. If, however, the goods so transported were within the class known as contraband of war, or of a nature to aid the inhabitants in continuing resistance, it might be reasonably assumed that the act of transportation was a breach of neutrality,[88] although it is held that it is not a violation of a maritime blockade for a neutral to export goods from a port not blockaded, to which they had been conveyed overland from the blockaded port.[89]

§ **2140. Continuance of Blockade.**—Although as a general rule, the presumption exists that a blockade by notification continues until notification that it is raised, and the blockading power should give prompt notice of discontinuance,[90] yet other acts will justify the presumption that the blockade is raised. Thus, if a neutral receives information from one of the blockading powers on whom he is justified in relying, such notice, though erroneous, will excuse his proceeding to or attempting to enter the blockaded port.[91] So the blockade

from the law of nations." The Flad Oyen, 1 Rob. 142; The Fox, Edw. Adm. 311. The greater part of the above note is taken in substance from 2 Lossing's Harper's Cyclopedia of United States History, ed. 1893, 1034, title "Orders and Decrees," 966, title "Neutrals, Rights of Attacked," and in part from 1 Duer on Marine Insurance, ed. 1845, 644, and note b. In 1810 Congress passed an act, the purpose of which was to obtain a revocation of British and French orders, but it proved unsuccessful: 2 Lossing's Harper's Cyclopedia of United States History, ed. 1893, 1215, tit. "Revocation of British 'Orders' and French 'Decrees' Sought."

[87] The Ocean, 3 C. Rob. 297; The Jonge Pieter, 4 C. Rob. 79.

[88] Letter to American minister at London, Sept. 20, 1800; 3 Wheat. (U. S.) Append. 41; 1 Duer on Marine Insurance, ed. 1845, 656, 658, sec. 32. Although it is said "all commerce is absolutely prohibited with a town or place besieged, invested, or even blockaded": 1 Marshall on Insurance, 1810, *80.

[89] The Ocean, 3 Rob. 297.

[90] The Neptunus, 1 C. Rob. 170. See The Betsey, 1 Rob. 332; The Shepherdess, 5 Rob. 262.

[91] The Neptunus, 2 Rob. 112; Northcote v. Douglass, 10 Moore P. C. 37; The Courier, 1 Edw. 249. See Oldden v. M'Chesney, 5 Serg. & R. (Pa.) 71.

must be uniform, constant, and general as to all vessels not privileged by law, not permitting some to pass and excluding others under like circumstances, otherwise it may be justly inferred that the blockade is raised;[92] and the blockade may be discontinued by the blockading force being dispersed or driven away by the enemy, in which case, if resumed, another notice is required.[93] There must be an adequate force present. The animus revertendi of the blockading fleet does not continue the blockade, nor is the entry of a neutral, after being notified, a breach of his neutrality if the blockading force be not before the port.[94] But an accidental or temporary removal of a blockading fleet by winds or storms, the commander intending to return at once, and using due diligence to effect the same, does not suspend the blockade, and if the neutral, with notice or knowledege of the cause of its absence, attempts to enter it is a breach of the blockade.[95]

§ 2141. Effect of Sailing for Blockaded Port—Intention to Enter—Breach of Blockade—What is and is not. There is declared to be a difference between a de facto blockade arising from mere maritime investment of the port, and one in which the blockading power has duly notified all neutral states, since in the former case the ignorance of the neutral in sailing to a blockaded port may be proven, whereas in the latter case the act of a neutral ship in sailing for the blockaded port with knowledge of the blockade is a breach thereof; at least, such is the opinion of Sir William Scott.[96] But the rule is generally thus stated: The mere act of sailing for a blockaded port with knowledge that it is such must be coupled with the intent to evade the blockade.[97] If, how-

[92] The Rolla, 6 C. Rob. 364, per Sir Wm. Scott. See Oldden v. M'Chesney, 5 Serg. & R. (Pa.) 71.

[93] The Hoffnung, 6 Rob. 117; The Triheten, 6 Rob. 65.

[94] Williams v. Smith, 2 Caines (N. Y.), 1; 2 Am. Dec. 209.

[95] The Hoffman, 6 Rob. 116. See The Margeretha, 6 Rob. 62; The Neptunus, 1 Rob. 170; The Vrow Johanna, 2 Rob. 109.

[96] The Vrow Johanna, 2 Rob. 109, and opinions of Sir Wm. Scott, 111, 114, 116, 121, 128, 131; 1 Marshall on Insurance, ed. 1810, *81; 1 Duer on Marine Insurance, ed. 1845, 669, sec. 44.

[97] The Columbia, 1 Rob. 154; the Neptunus, 2 Rob. 110; The Betsey, 1 C. Rob. 334; Fitzsimmons v. Newport Ins. Co., 4 Cranch (U. S.),

ever, the mere sailing with knowledge of the blockade is an overt act evidencing the beginning of the execution of the intention to evade the blockade, and is so far conclusive evidence of the intent, then it would be a breach from the departure of the vessel,[98] and so construed there is substantially little, if any, difference between the two rules. But if the intent to evade the blockade depends upon other evidence than the mere act of sailing with knowledge of its existence, such a construction makes the last rule entirely different in its effect from that first noted. Thus, it is expressly held in New York that a mere sailing for a port understood to be blockaded is not such a breach of neutrality as affects a policy of insurance.[99] The doctrine of the New York cases is, however, criticised by Mr. Duer as opposed to the authorities.[100] Again, it is held that a vessel might lawfully sail for a port in the West Indies known to be blockaded until she was warned off, according to the British orders of April, 1804, relating to blockades in the West Indies. She was not bound to make inquiry elsewhere than of the blockading force.[101] It is also intimated that a vessel may, with knowledge of the fact of blockade, sail from the United States to a blockaded port in Europe under instructions to ascertain if it has been raised, or under the expectation that it might be raised, intending to proceed to another port if it has not, and also that the intent

185, 199, per Marshall, C. J.; The Nereide, 9 Cranch (U. S.), 440, per Story, J.; The Shepherdess, 5 C. Rob. 262; The Vrow Johanna, 2 Rob. 109; The James Cooke, Edw. Adm. 261; The Irene, 5 Rob. 81, per Sir Wm. Scott; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 747; 1 Phillips on Insurance, 3d ed., 459, secs. 831, 833; 1 Duer on Marine Insurance, ed. 1845, 666, 667, secs. 41, 42, 690-98.

[98] Yeaton v. Fry, 5 Cranch (U. S.), 335; 1 Kent's Commentaries, 5th ed., 147, et seq.

[99] Voss v. United Ins. Co., 1 Caines Cas. (N. Y.) 7; 2 Johns. (N. Y.) 469; reversing 2 Johns. Cas. (N. Y.) 180; Leotard v. Graves, 3 Caines (N. Y.), 226. See, also, Sperry v. Delaware Ins. Co., 2 Wash. (C. C.) 243; Medeiros v. Hill, 8 Bing. 231, per Tindal, C. J., noted below.

[100] 1 Duer on Marine Insurance, ed. 1845, 696, et seq. See, also, 1 Duer on Marine Insurance, 664, et seq., and criticism (1 Duer on Marine Insurance, 691, et seq.) of note to Oliveria v. Union Ins. Co., 3 Wheat. (U. S.) 196, appendix, and cases cited.

[101] Maryland Ins. Co. v. Woods, 6 Cranch (U. S.), 29.

to evade the blockade must not only exist, but must be coupled with some act in furtherance thereof.[102] But if the intent to violate the blockade has been given up and the course changed, the ground for seizure no longer exists.[103] If insurance be against all risks, blockaded ports excepted, a vessel sailing for a blockaded port, not knowing that it is blockaded, is covered by the policy. The exception is not of the port, but of the risk of capture for breaking the blockade; and a vessel sailing ignorantly to a blockaded port is not liable to capture under the law of nations. She is entitled to notice and warning from the blockading belligerent not to proceed;[104] but if after such notice she deliberately proceeds, regardless of the warning, and the intent is clear, she is subject to seizure.[105] And if information be obtained of the existence of the blockade at a port at which the vessel touches on the voyage, this is such a notice as that her neutrality is forfeited if she then proceeds to the blockaded port or attempts to enter;[106] although it is held that mere intention to enter a blockaded port, without any actual attempt after being warned off, is no breach of the blockade, and no cause for condemnation either by international law or by the treaty between the United States and Great Britain, and that where an American vessel and cargo were condemned by a British court of admiralty for persisting in an intention to enter a blockaded port, the condemnation was illegal, and the insurers were liable.[107] So persisting in

[102] Fitzsimmons v. Newport Ins. Co., 4 Cranch (U. S.), 185, per Marshall, C. J.; Calhoun v. Insurance Co., 1 Binn. (Pa.), per Brackenridge, J.; Sperry v. Delaware Ins. Co., 2 Wash. (C. C.) 243. See The Shepherdess, 5 Rob. 264; Dalgleish v. Hodgson, 7 Bing. 495; Medeiros v. Hill, 8 Bing. 231; Naylor v. Taylor, 6 Barn. & C. 718.

[103] The Trende Lostre, 6 C. Rob. 290, n.; The Imina, 3 C. Rob. 168; The James Cook, 1 Edw. Adm. 261.

[104] Yeatin v. Fry, 5 Cranch (U. S.), 335. See The Columbia, 1 Rob. 156; Fitzsimmons v. Newport Ins. Co., 4 Cranch (U. S.), 200; Treaty between United States and Great Britain, 1794, sec. 18, providing for notice in case vessels sailed without port blockaded.

[105] The Apollo, 5 Rob. 256; The Adonis, 5 C. Rob. 228; The Tutela, 6 C. Rob. 177.

[106] Winder v. Wise, Dan. & Ll. Merc. Cas. 23; The Columbia, 1 Rob. 130.

[107] Williamson v. Tunno, 1 Brev. (S. C.) 151; 2 Am. Dec. 654. See, also, Skerry v. Delaware Ins. Co., 2 Wash. (C. C.) 243.

an intention to enter is not an attempt to enter under a treaty which provides that "the ship may be turned away, but she shall not be detained if cargo is not contraband nor be confiscated, unless after notice she shall again attempt to enter."[108] Lingering about the place as if waiting for an opportunity to enter, or, in some instances, not making immediately for another port, or perhaps a clearly evidenced purpose to carry out a declaration of a resolution to break the blockade after warning, or approaching so closely as to be enabled to slip in if opportunity affords might be evidence of an attempt to enter the blockaded port.[109] Nor may the vessel be permitted to proceed to the very port or mouth of the harbor for the purpose of ascertaining if the blockade be raised. The vessel has no right to inquire of the blockading squadron, but is bound to make inquiry at a neighboring port.[110] And entry may in certain cases of physical necessity, such, perhaps, as stress of weather, be justified,[111] or a license or express or implied permission may be given.[112] Where the insurers "take no risk of a

[108] Fitzsimmons v. Newport Ins. Co., 4 Cranch (U. S.), 185 (under treaty between the United States and Great Britain).

[109] Fitzsimmons v. Newport Ins. Co., 4 Cranch (U. S.), 199, per Marshall, C. J. See The Apollo, 5 Rob. 256, per Sir Wm. Scott; The Charlotte Christina, 6 Rob. 101; The Elizabeth, 1 Edw. Adm. 198; The Neutralitel, 6 Rob. 30; The Arthur, 1 Edw. Adm. 202; The Columbia, 1 C. Rob. 154.

[110] The Spes, 5 Rob. 75, per Sir Wm. Scott; The Juno, 2 C. Rob. 116; Maryland Ins. Co. v. Woods, 6 Cranch (U. S.), 45, 48. But see Sperry v. Delaware Ins. Co., 2 Wash. (C. C.) 243, per Washington, J. It is declared that no case "has laid it down that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is any offense against the law of nations, where there is no premeditated intention of breaking the blockade if it shall be found to continue in force when the ship arrives off the port," as it might be of the utmost importance to a merchant to introduce his goods into that port at the very first moment the blockade is raised: Medeiros v. Hill, 8 Bing. 231, per Tindal, C. J.; relying on the Shepherdess, 5 Rob. 264; Naylor v. Taylor, 9 Barn. & C. 718, per Lord Tenterden; and denying that The Neptunus, 2 Rob. 110, decides otherwise.

[111] The Charlotta, 1 Edw. Adm. 252; The Fortuna, 5 Rob. 27. But see The Shepherdess, 5 Rob. 262; The Hurtige Dane, 2 Rob. 124; The Arthur, 1 Edw. Adm. 202.

[112] The Juffrow Maria Schroeder, 3 Rob. 147; The Juno, 2 Rob. 116.

blockaded port, but if turned away the insured to be at liberty to proceed to a port not blockaded," they will not be liable for any loss happening in consequence of the blockade, whether such blockade is strictly legal or not,[113] and a neutral vessel permitted by the blockading force to enter may have egress with her original cargo.[114] So a vessel within a port blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within that clause of the policy insuring against "arrests and restraints," and if the vessel so prevented be a neutral cargo laden before the institution of the blockade, the restraint is unlawful.[115] And the egress may perhaps be justifiable where the cargo has been actually delivered to the master before the blockade was established. But, in other cases, attempting egress with a cargo wholly or partly laden after the blockade is established, and if its existence ought to have been known, violates the blockade.[116] So egress of a neutral ship in ballast exempts from condemnation, even though she is purchased from an enemy, provided the sale is bona fide and delivery made before the blockade was established, but otherwise where such purchase was made after the blockade was commenced.[117] And a neutral ship may leave with a cargo, the proceeds of funds of neutral owners, where the necessity of saving the goods from confiscation by reason of impending war is imminent and pressing.[118] And where under an insurance effected during the Civil War the vessel proceeded on her voyage and was stopped by the enemy's squadron blockading Chesapeake Bay, and sent back to port, it was held not to be a loss of the voy-

[113] Radcliff v. United Ins. Co., 7 Johns. (N. Y.) 38.

[114] The Maria Schroeder, 4 Rob. 89, n.

[115] Olivera v. Union Ins. Co., 3 Wheat. (U. S.) 183. See, also, Oldden v. M'Chesney, 5 Serg. & R. (Pa.) 71; The Juno, 2 Rob. 118; The Vrouw Judith, 1 C. Rob. 150.

[116] The Rolla, 6 Rob. 371; The Neptunus, 1 Rob. 170; The Calypso, 2 Rob. 298; The Vrouw Judith, 1 Rob. 150.

[117] The Potsdam, 4 Rob. 89; The Frederick Molke, 1 C. Rob. 88; The General Hamilton, 6 Rob. 61.

[118] The Drie Vrienden, 1 Dod. 270; The Wassen Hundt, 1 Dod. 271, n.

age within the policy;[119] for it is held that a blockade is not an unlawful restraint.[120]

§ 2142. Simulated or False Papers—Concealment—Suppression or Spoliation of Papers.—If unlawful goods or their destination, or the unlawful employment of the ship, is sought to be covered by false or simulated papers, or belligerent goods are attempted to be disguised and carried as neutral under such papers, the act will generally amount to a breach of the warranty of neutrality, and will involve those who are parties or privies to the fraud, as well as principals to whom may be imputed the acts of their agents. If done without permission of the underwriters given in the policy, and the property is condemned on that account, the insurers are discharged, and this is so held even though it is the only means by which that trade can be carried on, and the risk is in fact diminished thereby, and probably so where the risk is not excluded by warranty or representation;[121] although so far as the underwriter's liability is concerned, it is doubtful whether his permission would not be implied from a well-

[119] Patterson v. Insurance Co., 5 Har. & J. (Md.) 417. In this case Wirt, attorney general of the United States, contended that as the vessel was stopped by the enemy's blockading squadron and sent back in good order, there was no right to abandon under a clause in the policy wherein the assurers assumed responsibility for "unlawful arrests or detention." It was held in this case that capture was made with a view to prize, but arrest with a view to restoration. See, also, Hodkinson v. Robinson, 3 Bos. & P. 388.

[120] Brewer v. Union Ins. Co., 12 Mass. 170; McCall v. Marine Ins. Co., 8 Cranch (U. S.), 59.

[121] Horneyer v. Lushington, 15 East, 46; 3 Camp. 85; The Nancy, 3 Rob. 122; The Alexander, 1 Gall. (C. C.) 536; Schwartz v. Insurance Co. of North America, 6 Binn. (Pa.) 378; The Eeuron, 2 Rob. 9; Blagge v. New York Ins. Co., 1 Caines (N. Y.), 565; The St. Nicholas, 1 Wheat. (U. S.) 417; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 536; The Rosalie, 2 Rob. 343; Phœnix Ins. Co. v. Pratt, 2 Binn. (Pa.) 308; The Juffrou Anna, 1 Rob. 124; Pratt v. Phœnix Ins. Co., 1 Browne (Pa.), 152; The Graaff Bernstorf, 3 Rob. 109; The Ann Green, 1 Gall. (C. C.) 275; The Eliza, 6 Rob. 192; The Carolina, 3 Rob. 75; The Calypso, 2 Rob. 154; The Phœnix, 3 Rob. 186; The Fortuna, 3 Wheat. (U. S.) 245; The Betsey, 2 Gall. (C. C.) 384; Steele v. Lacy, 3 Taunt. 284.

known and general usage to carry false papers, or so where the nature of the voyage is such that the carrying of such papers is indispensable, and it has been so expressly declared by high authority.[122] If the general agent of ship and cargo covers enemy's property on board the warrant of neutrality is violated.[123] And where goods were warranted American in a policy, it was held that the insured could not recover after an attempt by their captain or general agent to cover foreign goods, though such foreign goods were covered without the consent of the insured and could easily be distinguished from the American.[124] It is a breach of warranty of neutrality that a vessel and cargo, warranted American property, shall be navigated and claimed as Spanish property, and that all evidence to prove the neutrality of the vessel and cargo is concealed from the captors. In case of such warranty it is not only necessary that the cargo should be in truth neutral, but also that no act of commission or of omission should be performed to jeopardize the claim to a neutral character, whether by the owner or by his agents.[125] So the warranty in a policy of insurance that the property belongs to the insured is falsified by his having concealed papers on the vessel at the time of capture, having practiced artifice to prevent their detection,

[122] Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506, per Marshall, C. J.; Planche v. Fletcher, Doug. 283, per Lord Mansfield. See, also, Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159; Galbraith v. Gracie, 1 Wash. (C. C.) 192; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151; 1 Phillips on Insurance, 3d ed., 444, secs. 809-11. It is said by Emerigon that: "If the simulation is concealed from the insurers, they will not be responsible for the confiscation of the effects insured. . . . It results . . . . that the insurers answer for the capture if the simulation or the 'for account' has been declared to them in the policy. . . . . There is no doubt that the insurers will then be responsible for the loss if the effects insured are captured and confiscated by the enemy": Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 20, 367; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 631, sec. 233; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 633, 634, 685; 1 Duer on Marine Insurance, ed. 1845, 738-45, 637-40.

[123] Schwartz v. Insurance Co. of North America, 6 Binn. (Pa.) 378; Pratt v. Phœnix Ins. Co., 1 Browne (Pa.), 152.

[124] Phœnix Ins. Co. v. Pratt, 2 Binn. (Pa.) 308.

[125] Galbraith v. Gracie, 1 Wash. (C. C.) 219.

and by the use of fictitious names for the purpose.[126] But the concealment or spoliation of papers is not proof of enemy's property sufficient of itself to warrant a condemnation, although it may justify a detention and, unexplained, may warrant confiscation, dependent upon all the circumstances, although if the destruction of papers is entire, the presumption against innocent goods is stronger than otherwise.[127]

§ 2143. Carrying Contraband Goods—Contraband of War—Breach of Neutrality.—Carrying goods contraband of war prohibited by treaty with the government to which the neutral shipowner belongs is a breach of neutrality extending to freight, and probably to the ship, where the terms of the treaty are clear and it is clearly violated.[128] And the carrying of contraband generally constitutes a breach of neutrality, attended with loss of freight, except in certain cases where the shipowner also owns the cargo, or all the owners of ship and cargo are concerned in the act under special circumstances which may entail the greater loss of both ship and cargo.[129] A breach of express warranty against carrying contraband of war will avoid the policy,[130] but in a policy on commissions upon lawful goods, the warranty against contraband goods is not broken, though the assured is captain and the contraband goods are shipped without the knowledge of the insurer.[131] In a Maryland case, in an action upon an open policy of insurance on a cargo, it appeared that the vessel and

[126] Carrere v. Union Ins. Co., 3 Har. & J. (Md.) 324; 5 Am. Dec. 437. See, also, Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 536, per Marshall, C. J.

[127] The Ann Green, 1 Gall. (C. C.) 281, per Story, J.; The Pizarro, 2 Wheat. (U. S.) 241; The Rising Sun, 2 Rob. 108; The Polly, 2 Rob. 362; The Hunter, 1 Dod. 480; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 544, 545; The Romeo, 6 Rob. 351.

[128] The Neutralitet, 3 Rob. 295.

[129] The Richmond, 5 Rob. 290; The Commercen, 1 Wheat. (U. S.) 388, per Story, J.; 2 Gall. (C. C.) 264; The Mercurius, 1 Rob. 288; The Jonge Tobias, 1 Rob. 330; The Franklin, 3 Rob. 217; The Ringende Jacob, 1 Rob. 89; The Jemima, 3 Rob. 168. See The Charlotte, 5 Rob. 277; The Jonge Margaretha, 1 Rob. 189.

[130] Seymour v. London & P. M. Ins. Co., 41 L. J. Com. P. 193.

[131] De Peyster v. Gardner, 1 Caines (N. Y.), 492.

cargo had been condemned on account of contraband trade, but that neither the insured nor insurer knew of the contraband articles being on board. There was no representation or warranty that either vessel or cargo were neutral. It appeared also that the interest of the assured greatly exceeded the amount insured, and it was held that the plaintiff was entitled to recover.[132]

§ **2144. Breach of Neutrality from Resistance to Lawful Right of Search.**—The resistance to the right of search in time of war, lawfully exercised for a lawful purpose, constitutes a breach of neutrality. It must be exercised by a lawfully commissioned cruiser of the belligerent, or by his ships of war, and extends only to private merchant ships, and not to public ships of war. The object of search is limited to enemy's property contraband of war, or men in the military or naval service of the enemy. The law of nations also impresses upon belligerents the duty to show their colors, or make known their belligerent character and the cause of detention, otherwise the neutral is not only justified in resisting, but is obligated so to do, and the rescue of a neutral ship from a belligerent is such a breach of neutrality that the insurers will be exonerated in case of loss. Nor will resistance to the right of search be justified by instructions or orders of the government of the neutral. The above rule is subject to treaty stipulations with the neutral power.[133] Although the right of search should be lawfully exercised, with due regard to the

[132] Baltimore Ins. Co. v. Taylor, 3 Har. & J. (Md.) 198.

[133] M'Lellan v. Maine F. & M. Ins. Co., 12 Mass. 246; The Pizarro, 2 Wheat. (U. S.) 227; The Elsabe, 4 Rob. 408; The Anna Maria, 2 Wheat. (U. S.) 332, per Marshall, C. J.; Robinson v. Jones, 8 Mass. 536; The Maria, 1 Rob. 340, per Lord Stowell; The Mariana Flora, 11 Wheat. (U. S.) 42; Wilcocks v. Union Ins. Co., 2 Browne. (Pa.) 574; Snowden v. Phœnix Ins. Co., 3 Binn. (Pa.) 457; The Nereide, 9 Cranch (U. S.), 427; The Despatch, 3 Rob. 279. June 25, 1792, an act was passed by Congress authorizing resistance to and the taking as prize of French vessels attempting search and seizure of merchant vessels of the United States and the rescue of vessels seized by the French with benefit of salvage: 2 Lossing's Harper's Cyclopedia of United States History, ed. 1893, 1201, tit. "Resistance to Search."

rights of the master and crew and safety of the ship, yet if the authority and cause of detention be made known, it seems to be the duty of the neutral master to submit, upon remonstrance, to even gross misconduct not menacing life, relying upon his right to redress from the belligerent for damages. But if no authority be made known, the right and duty to resist exists, for in such case neither the owners nor the government to which the neutral belonged could demand indemnity.[134] Where a ship was warranted Danish property, and she was seized and sent into port for examination, her rescue by the master and crew was held a breach of the warranty; and the same would be true of an attempt to rescue.[135] If the right of search is attempted in neutral waters, it may be resisted, for it cannot be lawfully exercised there.[136] The United States denies the right of search for seamen or subjects of the belligerent, although it was once insisted on by Great Britain.[137]

[134] See the Anna Maria, 2 Wheat. (U. S.) 328; M'Lellan v. Maine F. & M. Ins. Co., 12 Mass. 246; 1 Duer on Marine Insurance, ed. 1845, 727, sec. 12; 1 Kent's Commentaries, ed. 1844, 156, note a.

[135] Garrels v. Kensington, 8 Term Rep. 230; Wilcocks v. Union Ins. Co., 2 Binn. (Pa.) 574; The Despatch, 3 C. Rob. 278.

[136] The Topaz, 2 Act. App. Cas. 20.

[137] October 17, 1807, commanders of British ships of war were authorized by proclamation to seize all British mariners on board foreign merchant vessels: 2 Lossing's Harper's Cyclopedia of United States History, ed. 1893, 1186, tit. "Recall of British Seamen," "Impressment," "Impress, The Treaty of 1806."

CHAPTER XLVIII.

SEAWORTHINESS.

§ 2151. Warranty of seaworthiness implied: Voyage policy—General rule.
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§ 2151. Warranty of Seaworthiness Implied—Voyage Policy—General Rule.—It is well settled that there is an implied warranty in every contract of marine insurance under a voyage policy on ship, cargo, or freight that the vessel is seaworthy and competent to perform her voyage at the time she sails. She must be tight, staunch, and strong, properly manned and equipped, and otherwise fit and in a navigable state for the service and voyage contemplated. If she is not seaworthy for the service and voyage intended, and not fit to encounter ordinary perils, no matter what the cause, or however innocent the assured may be, the underwriter on the ship or on the goods conveyed therein, or on the freight, is not liable,[1] and it is a good defense on a general average bond

[1] Christie v. Secretan, 8 Term Rep. 192, per Lawrence, J.; Small v. Gibson, 4 H. L. Cas. 384, per Erle, J.; Shoolbred v. Nutt, reported in 1 Marshall on Insurance, ed. 1810, *475; Deshon v. Merchants' Ins. Co., 11 Met. 199, per Hubbard, J.; Lill v. Beach, reported in 1 Marshall on Insurance, ed. 1810, *160; Dixon v. Sadler, 5 Mees. & W. 414, per Parke, B.; Ward v. China Mut. Ins. Co., 4 Fed. Rep. 43; Wilkie v. Geddis, 3 Dow. 60, per Lord Redesdale; Donnally v. Merchants' Mut. Ins. Co., 28 La. Ann. 939; 26 Am. Rep. 129 (on freight); Wedderburn v. Bell, 1 Camp. 1, per Lord Ellenborough; Starbuck v. New England Ins. Co., 19 Pick. (Mass.) 198; Oliver v. Cowley, reported in 1 Marshall on Insurance, ed. 1810, *160; Dudgeon v. Pembroke, 1 Q. B. D. Ex. 96; Forshaw v. Chabert, 3 Brod. & B. 158; Koebel v. Saunders, 17 Com. B., N. S., 71; 33 L. J. Com. P. 310; Quebec M. Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 234; Hoxie v. Home Ins. Co., 32 Conn. 2; 85 Am. Dec. 240; Merchants' Ins. Co. v. Morrisson, 62 Ill. 242; Dupeyre v. Western etc. Ins. Co., 2 Rob. (La.) 457; 38 Am. Dec. 218; Southern v. Memphis Ins. Co., 3 La. Ann. 474; Field v. Insurance Co. of North America, 3 Md. 244; Taylor v. Lowell, 3 Mass. 331; Hoxie v. Pacific Mut. Ins. Co., 7 Allen (Mass.), 211; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; Talcot v. Marine Ins. Co., 2 Johns. (N. Y.) 130; Van Wickle v. Mechanics' etc. Ins. Co., 97 N. Y. 350; Walden

that the loss was caused by the unseaworthiness of the vessel.[2] The warranty does not mean, however, that the cargo itself is seaworthy, but that the ship in which it is conveyed is seaworthy, and the warranty applies although the shipper of the goods may be innocent and has no interest in the ship.[3] And it is decided that the implied warranty of seaworthiness on the part of the shipowner exists and is a condition precedent to performance by the shipper in every charter-party or contract of affreightment, and if a vessel chartered to carry a contract is not seaworthy at the date of the charter and the delivery of the cargo, there is such a nonperformance of the condition precedent by the shipowner that the shipper is released, and may recover possession of his property and such damages as he may have sustained by such breach.[4]

2152. Whether Warranty of Seaworthiness Implied in Time Policies—The English Rule.—Although there was formerly some doubt in England, it seems to be the finally settled doctrine that the law does not, in the absence of special stipulations in the contract, imply any warranty in time

v. Firemen's Ins. Co., 12 Johns. (N. Y.) 128; Silva v. Low, 1 Johns. Cas. (N. Y.) 184; Barnewell v. Church, 1 Caines (N. Y.), 217; American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 532; Talcot v. Commercial Ins. Co., 2 Johns. (N. Y.) 124; Rogers v. Sun Mut. Ins. Co., 46 N. Y. Sup. Ct. 65; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340; 41 Am. Dec. 592; Hudson v. Williamson, 3 Brev. (S. C.) 342; Ingraham v. South Carolina Ins. Co., 2 Tread. Const. (S. C.) 707; Prescott v. Union Ins. Co., 2 Wash. (C. C.) 152, 480; M'Lanahan v. Universal Ins. Co., 1 Pet. (U. S.) 183; Seamen v. Enterprise F. & M. Ins. Co., 21 Fed. Rep. 778; note 58 Am. Dec. 671-74. "In every marine insurance upon ship or freight or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy": Deering's Annot. Civ. Code Cal., sec. 2681; N. Y. Civ. Code, sec. 1460. See Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 38, pp. 444-63; c. vi, sec. 4, p. 138.

[2] Cheraw Salisbury R. R. Co. v. Broadnax, 109 Pa. St. 432; 58 Am. Rep. 733.

[3] Oliver v. Cowley, reported in 1 Marshall on Insurance, ed. 1810, *160; 1 Park on Insurance, 470; Koebel v. Saunders, 17 Com. B., N. S., 71; 33 L. J. Com. P. 310; Acatos v. Burns, L. R. 3 Ex. D. 282.

[4] The Director, 34 Fed. Rep. 57 (annotated case); 36 Fed. Rep. 335. See McAdams v. Severick, 35 Fed. Rep. 305 (annotated case).

policies that the vessel shall be seaworthy at any particular time.[5] Notwithstanding this rule, it is intimated in an English case that a vessel under a time policy which has been for a long time on a distant voyage must, although her crew has been reduced by death or desertion, have a sufficient crew for some of the objects of the voyage and for navigating the ship home.[6]

§ 2153. Whether Warranty of Seaworthiness in Time Policies in this Country.—Although such is the settled law of England, resting upon the rule stare decisis and public policy,[7] nevertheless the law in this country cannot be said to be settled upon this point at the present time. It is decided in an Illinois case that under a time policy there is no implied warranty of seaworthiness when the vessel starts on her first voyage.[8] Under a Massachusetts decision, where the vessel is at sea it is held that there is no implied warranty that the ship is seaworthy at the commencement

[5] Dudgeon v. Pembroke, L. R. 2 App. Cas. 284; 1 Q. B. D. L. R. 96; 9 Q. B. 581, per Lord Campbell; Gibson v. Small, 4 H. L. Cas. 353; affirming Small v. Gibson, 16 Q. B. 141; reversing 16 Q. B. 128; 19 L. J. Q. B. 147; 14 Jur. 368. In this case, the question was exhaustively considered for the first time (1849); Thompson v. Hopper, 6 El. & B. 172; 25 L. J. Q. B. 240, per Lord Campbell; El. B. & E. 1038; 27 L. J. Q. B. 441; Fawens v. Fairfield, 6 El. & B. 192; 25 L. J. Q. B. 249; Jenkins v. Heycock, 8 Moore P. C. 351; Michael v. Tredwin, 17 Com. B. 251; 25 L. J. Com. P. 83; West India Telegraph Co. v. Home etc. Ins. Co., 6 Q. B. D. 51, 62. In Dixon v. Sadler, 8 Mees. & W., affirming 5 Mees. & W. 405, Tindal, C. J., declared in substance that there was no distinction between time and voyage policies with regard to providing a competent master and crew and nonresponsibility for their subsequent improper conduct. This case must, however, be considered overruled. See, also, to same effect, Hollingsworth v. Brodrick, 7 Ad. & E. 40. "It is settled law that there is no implied warranty of seaworthiness in any time policy. . . . . If, however, a vessel insured under a time policy sail in an unseaworthy state and incur loss consequent thereupon, and not directly attributable to a peril insured against, such loss will not be recoverable": McArthur on Marine Insurance, ed. 1890, 15.

[6] Hucks v. Thornton, Holt N. P. 30.

[7] Dudgeon v. Pembroke, L. R. 2 App. Cas. 284, per Lord Campbell.

[8] Merchants' Ins. Co. v. Morrison, 62 Ill. 242; 14 Am. Dec. 93 (decided 1871).

of the risk.[9] But in another case in the same state it was held that if the vessel is at sea, there is an implied warranty that she has sailed in a seaworthy condition, and is then so far safe and existing as a vessel as to be properly a subject for insurance at the time the risk attaches, and is capable of being made navigable by suitable repairs in port on arrival, and that the owners will make her seaworthy if possible. But if she has ceased to exist as a vessel at the time the policy would otherwise attach, and is incapable by reasonable and suitable repairs of being made navigable, or if she sails from a subsequent port in such an unseaworthy condition that the loss is immediately attributable thereto, either wholly or partly, no recovery can be had, although if the loss does not proceed from such default in making her navigable, but happens from a peril insured against, a recovery may be had.[10] Again, in that state it is held that under a policy on unlimited time the insurer is discharged if the vessel becomes unseaworthy,[11] and also that under a time policy on a vessel in a foreign port, if full repairs may be made, that there is an implied warranty of seaworthiness both in port and in setting out therefrom. The court, however, declares that it does not decide anything beyond the precise case before it,[12] and also expressly disclaims stating any rule which would imply a warranty of seaworthiness under a time policy on a vessel at sea, on the ground that the insured has no means of knowing her actual condition, or of restoring her to a seaworthy condition if not so at the time the policy is to attach, and the contract is fully entered into with a precise understanding of the situation, and therefore the circumstances tend to rebut any implied warranty that the vessel is

[9] Macy v. Mutual etc. Ins. Co., 12 Gray (Mass.), 497.

[10] Capen v. Washington Ins. Co., 12 Cush. (Mass.) 517, per Shaw, C. J. The court limited its ruling to the exact question before it.

[11] Cleveland v. Union Ins. Co., 8 Mass. 308.

[12] Hoxie v. Pacific Mut. Ins. Co., 7 Allen (Mass.), 211. The English cases relied on are Small v. Gibson, 16 Q. B. 128, 141; Hucks v. Thornton, Holt N. P. 30; Hollingworth v. Brodrick, 7 Ad. & E. 40; Sadler v. Dixon, 8 Mees. & W. 895. But as to these cases see the rule in England first stated under this section.

seaworthy when the risk attaches.[13] In Connecticut, it is held that the warranty of seaworthiness is a necessary incident to all contracts of marine insurance, and applies to time as well as voyage policies.[14] In New York, seaworthiness at the inception of the risk is declared to be a condition precedent in every policy where the vessel is insured in port,[15] and in another case in that state a vessel insured on time was unseaworthy when leaving an intermediate port, and a recovery was not permitted, though the loss was not occasioned by such unseaworthiness, and although she had sailed in a seaworthy condition after the commencement of the risk.[16] And in the United States court it is held that under a time policy "lost or not lost," the vessel being in a distant sea, there is no implied warranty of seaworthiness, but otherwise where the policy is in the home port, and if the vessel enters upon her first voyage in an unseaworthy condition the insurers are discharged.[17] And this rule has been extended to the case where the vessel is in, or has arrived at a distant port before or after the commencement of the risk, and might or ought to have been repaired, and the vessel leaves such port and is lost in consequence of her unseaworthy condition, although it is also held that there is no absolute implied warranty of seaworthiness in a time policy.[18]

§ **2154. Same Subject—Conclusion.**—In England, in the case of Dudgeon v. Pembroke,[19] Lord Campbell declared that the law that there was no implied warranty of seaworthiness in time policies rested upon a course of decisions extending upwards of twenty years, and that it was too late to change the

[13] Hoxie v. Pacific Mut. Ins. Co., 7 Allen (Mass.), 211, per Bigelow, C. J. See Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227, per the court; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389.

[14] Hoxie v. Home Ins. Co., 32 Conn. 21; 85 Am. Dec. 240. See, also, Dallam v. Insurance Co., 6 Phila. (Pa.) 15.

[15] Berwind v. Greenwich Ins. Co., 114 N. Y. 234.

[16] American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287. See Hathaway v. Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33.

[17] Rouse v. Insurance Co., 3 Wall. Jr. (C. C.) 367.

[18] Jones v. Insurance Co., 2 Wall. Jr. (C. C.) 278, per Grier, J.

[19] L. R. 2 App. Cas. 284.

rule, except by legislative authority. We have, therefore, the two extremes of the English rule and that of the Connecticut decision above noted. There are certainly many serious objections to the doctrine of the Connecticut case, and, as to the English rule, outside of the principle stare decisis, Lord Campbell tacitly admits its objectionable grounds.[20] But even then the difficulty which the courts have experienced in attempting to formulate a definite, intermediary rule is obvious. It is pertinent to inquire whether in time policies, by reasonable construction, the nature and subject matter of the contract and the intention of the parties, coupled with the circumstances attending the making of the contract, rebut or tend to rebut the presumption of an implied warranty of seaworthiness. The situation of the ship at the time the policy is to attach becomes an important factor, as well as the fact whether she is so situated that she can be so prepared and fitted as to make her seaworthy, reference being had to the nature, extent, and necessities of the voyage and the service required. If at the time the risk is to attach the vessel is at sea, and the assured has no means of ascertaining her actual condition, or of changing it and making her seaworthy in case she is then unseaworthy, both parties are assumed to have had knowledge, and to have entered into the contract with reference thereto, and the presumption of an implied warranty of seaworthiness is necessarily rebutted. But this is not the case in all time policies. If the vessel is in port when the insurance is effected, the same reasons do not exist as in the last case for holding that the implied warranty is rebutted, and it is difficult to conceive why the vessel should not be seaworthy at the time of sailing, although the policy is to attach on a certain date prior to her actual departure. To say that the vessel may leave port in an unseaworthy condition in such case seems opposed to the fundamental principles of the con-

[20] He says: "Whatever may be argued as to the soundness of the conclusions then arrived at, or however desirable it may be as a matter of public policy and concern that some obligation of keeping his vessel, as far as it is within his power, seaworthy, should be cast upon the shipowner, the law must . . . . be considered as settled": Dudgeon v. Pembroke, L. R. 2 App. Cas. 284.

tract of insurance and inconsistent with its reasonable construction. But assume a case where the vessel has left port on the day preceding that named for the commencement of the risk, and is at sea when the risk attaches. Does the law then require that the ship shall be seaworthy at the commencement of the risk? Can the insurer avail himself of the fact that the ship was not absolutely seaworthy when she left port, provided she is safely at sea on the day named? These questions are qualifiedly answered in a Massachusetts case,[21] where the court asserts in effect that there is no absolute warranty of seaworthiness in such case, but if the risk attaches when the vessel first sails from port, that it is implied that she is then seaworthy, and if she is at sea, that she has only sailed in such a seaworthy condition as to be safe; that is, a proper subject of insurance. This declaration implies no more than this, that the vessel must so far exist as a vessel that the policy may attach, not that she must be seaworthy for the voyage, and it could hardly be asserted that the policy has a retrospective effect, so as to incorporate into it a warranty by implication that a vessel which had sailed from port and was at sea before the policy attached was absolutely seaworthy at the time of sailing from port. But the courts of that state have declared that under a policy at and from all ports and places to which the ship may proceed in the coasting trade for six months or a year, no difficulty can be experienced in making her seaworthy for the time insured.[22] Again, if during the existence of the risk the vessel arrives at a port in such a condition that she may not leave port with reasonable safety, it would seem only consistent with the requirements of the contract of marine insurance that the vessel should be made in some degree seaworthy for proceeding on her voyage, even though the policy be on time, although it might be questioned whether the liability of the insurer would exist, in case of loss, unless the act of knowingly sending the ship to sea was the immediate cause of the loss, and the question might arise wheth-

[21] Capen v. Washington Ins. Co., 12 Cush. (Mass.) 517.

[22] Hoxie v. Pacific Mut. Ins. Co., 7 Allen (Mass.), 211, per Bigelow, C. J.; instancing Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389.

er, if the action was barred it would not be because of the wrongful act whereby the loss was occasioned, rather than unseaworthiness.[23] It will be seen, therefore, that although a time policy is a contract of marine insurance, and has primarily incorporated therein an implied warranty of seaworthiness, yet there are numerous cases where such a warranty would be inconsistent with the very nature of the contract and the intention of the parties, evidenced by the circumstances attendant upon making the contract, and therefore in such cases the implied warranty is rebutted. It is also evident from the words of Lord Campbell above noted that the English rule rests mainly upon the principle stare decisis. Some obligation should certainly exist under a time policy whereby the vessel should be seaworthy. The extent to which this obligation should be enforced must rest with the courts, and to some extent upon legislative action. But it would seem that there is nothing in the nature of the contract itself, or in the usual circumstances attendant upon making it, which would rebut the presumption that the vessel is seaworthy when, at the beginning of her voyage, she sails from a port where the policy has attached. Beyond these points a difficulty arises. If the vessel is at sea when the risk attaches, having left port a short time prior thereto, events may have happened between leaving such port and the commencement of the risk which would cause the vessel to be not absolutely seaworthy, and nevertheless she might still be safe at sea, and a proper subject for the attachment of the risk. If a vessel insured under such a policy be obligated to repair at an intermediate port, the question is not then solved, for although it would seem consistent that she should be made in some degree seaworthy for her voyage, yet the question arises as to the degree of seaworthiness necessary, and as above stated, if she left an intermediate port in such an unseaworthy condition as not to be reasonably safe for a sea voyage, if such act was the immediate cause of loss, the issue might rest not

[23] See Thompson v. Hopper, El. B. & E. 1038; 96 Eng. C. L. 1038; 27 L. J. Q. B. 441; 6 El. & B. 172; 25 L. J. Q. B. 240; Capen v. Washington Ins. Co., 12 Cush. (Mass.) 517. But see sec. 2161, herein.

upon her unseaworthiness, but upon wrongful neglect of duty causing the loss.[24] It is doubtful, therefore, whether the decisions, in the absence of some statutory provision, will ever be reconciled upon any intermediary rule that extends beyond the two cases above noted, except possibly upon the ground in some court of stare decisis in that particular state.

§ **2155. Implied Warranty of Seaworthiness in Time Policies—Code Provisions—Stipulation.**—In a case in the federal courts the construction of the California code relative to seaworthiness under time policies arose. The code of that state provides that there is an implied warranty of seaworthiness in every policy of marine insurance,[25] and also that "when the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time." [26] The vessel was insured on time at and from a California port, and it was stipulated that the provisions of the code of that state relating to the warranty of seaworthiness should be conclusive and binding upon the parties. The vessel was not provided at the commencement of the voyage with ground tackle reasonably fit for the services and exigencies of the voyage, and was consequently totally lost, and the action, a libel on the policy, was dismissed.[27]

§ **2156. Innocence of Assured—Unknown Defects.**—It is not necessary that fraud be imputable to the assured; he may be innocent and believe that the vessel is seaworthy, yet if she is unseaworthy at the time of sailing, the policy is void, nor does it excuse him that there are unknown defects, nor that he has taken precautions to make her seaworthy, if

[24] But see sec. 2161, herein.

[25] Deering's Annot. Civ. Code Cal., sec. 2681.

[26] Deering's Annot. Civ. Code Cal., sec. 2683.

[27] Pope v. Swiss Lloyd Ins. Co., 6 Saw. (C. C.) 533; 4 Fed. Rep. 153; citing Gibson v. Small, 4 H. L. Cas. 35; Jones v. Insurance Co., 2 Wall. Jr. (U. S.), opinion Grier, J. See, also, Cox v. United States, 6 Pet. (U. S.) 203; 1 Gall. (C. C.) 371.

it subsequently appears that she was not in fact seaworthy.[28] So where a floating dock was insured, it was held that a loss arising from inherent defects, such as weakness or rottenness of timbers, insufficiency of machinery, or defective construction of valves, released the insurers;[29] and where it appeared that before the cargo was loaded the ship's timber holds were in a defective condition, by which water could enter, and that had the leak been known in time the vessel could have been kept clear by pumping, the ship was held unseaworthy.[30]

§ 2157. Effect of Exception of Losses Occasioned by Unseaworthiness—Knowledge.—If a policy of insurance excepts losses occasioned by unseaworthiness, the effect of such an exception is a warranty that the loss shall not be caused thereby, and it is not material in such case whether the vessel's unseaworthiness was known or unknown.[31]

§ 2158. Effect of Previous Survey—Certificate of Seaworthiness. — The fact that the vessel was surveyed before she sailed, and pronounced by carpenters to be competent, does not excuse the assured if she proves, in the course of the voyage, not to be seaworthy;[32] and although ship's carpenters certified that the repairs made were all that were nec-

[28] Oliver v. Cowley, reported in 1 Marshall on Insurance, ed. 1810, *160; 1 Park on Insurance, 470; Douglass v. Scougall, 4 Dow, 276, per Lord Eldon; Marcy v. Sun Ins. Co., 11 La. Ann. 748; Lee v. Beach, reported in 1 Marshall on Insurance, ed. 1810, *160; 1 Park on Insurance, 468; M'Cargo v. Merchants' Ins. Co., 10 Rob. (La.) 334; 1 Marshall on Insurance, ed. 1810, *161. See Richelieu & O. Nav. Co. v. Boston M. Ins. Co., 136 U. S. 408; 10 Sup. Ct. Rep. 934. Mills v. Roebuck, reported in 1 Marshall on Insurance, ed. 1810, *162, is opposed to law. See Watson v. Clark, 1 Dow, 336; Parker v. Potts, 3 Dow, 27.

[29] Marcy v. Sun Ins. Co., 11 La. Ann. 748.

[30] Standard Refinery Co. v. Schooner Centennial, 2 Fed. Rep. 409; citing Monticello v. Mollison, 17 How. (U. S.) 152; Insurance Co. v. The C. D. Jr., 1 Wood (C. C.), 72; Amazon Ins. Co. v. The Steamboat Iron Mountain, 4 Cent. L. J. 103.

[31] Richelieu & O. Nav. Co. v. Boston M. Ins. Co., 136 U. S. 408; 10 Sup. Ct. 934; 34 L. ed. 398.

[32] Warren v. United Ins. Co., 2 Johns. Cas. (N. Y.) 232; 1 Am. Dec. 164.

essary to enable her to proceed on her voyage, and it afterward appeared that she was unseaworthy as to her ironwork, her lower deck beams, and knees, by reason of which she was unable to withstand the ordinary perils of the sea, it was held that recovery could not be had.[33] Although in the federal court, where a vessel proceeded to a certain port for repairs, and upon survey being had it was declared that no repairs were necessary, and that she was seaworthy for the voyage, and therefore no repairs were made, it was held that a recovery could be had for a loss on such voyage, although the circumstances east the burden of proof of seaworthiness on assured.[34] And in another case in that court it was decided that, unless overcome by competent evidence, the report of the surveyors of a port is sufficient evidence that the vessel is seaworthy.[35] Where the rules of a mutual society required yearly surveys of the hull and materials of insured ships, and the providing of such repairs and stores as were deemed necessary by the underwriters, such requirement being a condition precedent, the ship was declared unseaworthy for noncompliance in furnishing the necessary repairs and stores.[36] And a survey of the vessel by the underwriter's agent is not a waiver of compliance with the warranty.[37] A vessel was surveyed in a port of distress, pronounced unfit for sea, sold as a wreck, purchased and repaired, again surveyed, and pronounced competent for the voyage and insured; she made water rapidly after sailing and was surveyed and condemned. It was held that she was unseaworthy, although the surveyors reported that her defective and injured condition was not in any degree occasioned by decay or rottenness of her materials.[38] But where for the purpose of showing that the vessel was seaworthy before she left her home port the certificate of a marine inspector was offered in connection with

[33] Douglass v. Scougall (The North Star), 4 Dow, 269.

[34] Lunt v. Boston M. Ins. Co., 19 Blatchf. (C. C.) 151; 17 Fed. Rep. 411; 6 Fed. Rep. 562.

[35] Batchelder v. Insurance Co., 30 Fed. Rep. 459.

[36] Stewart v. Wilson, 12 Mees. & W. 11.

[37] Dawson v. Cawley, Newf. Cas. 433.

[38] Parker v. Potts, 3 Durie, 23.

his oath, who stated that although he had no independent and distinct recollection of the facts therein stated, yet, so far as he remembered, the statements therein contained were true at the date thereof, such certificate was held competent evidence of the facts therein stated; it being declared that it was in its nature a semi-official document, and although not made in pursuance of any positive enactment or rule of law, nevertheless it ranked with entries made by bank clerks, messengers, and other similar agents.[39]

§ **2159. Different Degrees of Seaworthiness.**—That there are different degrees of seaworthiness dependent upon the character of the vessel, its construction, its navigation and service required, the length and nature of the voyage, the season of the year, its trade, and other factors, is clearly evidenced by the cases.[40] Thus, a "steamship" or vessel capable of being propelled by steam or sails must be seaworthy with reference to its character, service, and navigation required; she must be fully equipped, manned, and provisioned as a steamer and sailing vessel.[41] A flatboat navigating the Mississippi must be seaworthy with reference to its navigation and service required.[42] A voyage may require a different complement of men or state of equipment in different parts or stages; as in case of one down a canal or river and thence to the open sea.[43] This question of degree has become one of special importance at the present day. Although the principle underlying the doctrine of seaworthiness has not changed, nevertheless the

[39] Perkins v. Augusta I. & B. Co., 10 Gray (Mass.), 312; 71 Am. Dec. 654. See Berwind v. Greenwich Ins. Co., 114 N. Y. 231; 21 N. E. Rep. 151.

[40] See Bell v. Reed, 4 Binn. (Pa.) 127; Chase v. Eagle Ins. Co., 5 Pick. (Mass.) 51; Anner v. Woodman, 3 Taunt. 299; Ware v. Morris, 1 Dow, 32; Burger v. Wilkinson, 34 L. J. Q. B. 46; M'Lanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184; Knill v. Hooper, 2 Hurl. & N. 277; Woolf v. Claggett, 3 Esp. 257; Parker v. Potts, 3 Dow, 23; and in fact the cases throughout this chapter. See sec. 1767, herein.

[41] Howard v. Orient Mut. Ins. Co., 2 Rob. (N. Y.) 539; also, Myers v. Girard Ins. Co., 26 Pa. St. 192.

[42] Donnelly v. Merchants' Mut. Ins. Co., 28 La. Ann. 939; 26 Am. Rep. 129.

[43] Dixon v. Sadler, 5 Mees. & W. 405, per Parker, B.

modern vessel must undoubtedly possess many qualifications required by her construction, intended service, and safe navigation as necessary to her seaworthiness which could not have been formerly contemplated, and it is probably equally true that the standard of nautical skill on the part of those to whom the navigation of the vessel of the present is intrusted has been raised to a higher degree than formerly.[44] It is, however, held to be peculiarly within the province of the jury to determine upon the evidence as to the question of seaworthiness in the particular case before it.[45]

§ **2160. What Constitutes Seaworthiness.**—It is difficult to formulate a rule as to what constitutes seaworthiness that will apply to every case, although it may be generally stated that the vessel is seaworthy if she is fit to perform the voyage insured as to ordinary perils, reference being had to the nature of the service required, the character of the navigation, the trade in which she is engaged, and to the season of the year in which the voyage is to be made. She must be tight, staunch, and strong enough to resist the ordinary perils of the sea, in a fit state of repairs, properly manned and equipped, and supplied with whatever is required for the safe and secure navigation of the vessel, and necessary to meet the ordinary exigencies of the voyage.[46]

[44] See Tidmarsh v. Washington Ins. Co., 4 Marsh. 439, per Story, J.

[45] Fuller v. Alexander, 1 Brev. (S. C.) 149; M'Lanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184; Palmer v. Great Western Ins. Co., 27 N. Y. St. Rep. 675; Prescott v. Union Ins. Co., 1 Whart. (Pa.) 399.

[46] The Lillie Hamilton, 18 Fed. Rep. 327; Watt v. Morris, 1 Dow, 32; Watson v. Insurance Co. of North America, 2 Wash. (C. C.) 480; Daniels v. Harris, L. R. 10 Com. P. 1; Whitney v. Ocean Ins. Co., 14 La. Ann. 485; 32 Am. Dec. 595; Kittel v. Wiggin, 13 Mass. 68; Pope v. Swiss Lloyd Ins. Co., 4 Fed. Rep. 153; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270; Brown v. Girard, 4 Yeates (Pa.), 115; 1 Binn. (Pa.) 40; 2 Am. Dec. 400; Fontaine v. Phœnix Ins. Co., 10 Johns. (N. Y.) 58; Ross v. Sloop Active, 2 Wash. (C. C.) 226; Prescott v. Union Ins. Co., 1 Whart. (Pa.) 399; Draper v. Commercial Mut. Ins. Co., 4 Duer (N. Y.), 234; 21 N. Y. 378; Douglass v. Scougal, 4 Dow, 269; The Gentleman, Olc. Adm. 110; The Washington, 3 Blatchf. (C. C.) 276, per Nelson, J.; Walden v. New York Firemen's Ins. Co., 12 Johns. (N. Y.) 128; affirmed, 12 Johns. (N. Y.) 513; McDowell v. General M. Ins. Co., 7 La. Ann. 684; 56 Am. Dec. 619. "It is meant

§ 2161. What Constitutes Seaworthiness and Unseaworthiness—Cases.—The implied warranty of seaworthiness extends to the machinery of a steamer, to its construction, and power required for its navigation;[47] and a defect in her boiler although not apparent when she left port, makes the vessel unseaworthy.[48] So her engines must, when delivered, be fit to perform the service for which the vessel is engaged.[49] And the vessel must not be without necessary firewood, oil, and candles;[50] and medicines and necessaries for the voyage may be required.[51] The ship may be unseaworthy for want of the necessary ground tackle.[52] So she must be provided with all necessary stores,[53] and must have sufficient coal for the voy-

that she shall be in a fit state, as to repairs, equipment, and crew and in all other respects, to encounter the ordinary perils insured": Dixon v. Sadler, 5 Mees. & W. 414, per Parke, B. A ship "is seaworthy if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage unless it meet with extraordinary dangers": Small v. Gibson, 4 H. L. Cas. 384, per Earle, J. "Seaworthiness imports, in the law of insurance, a relation between the condition of the ship and the perils she may have to encounter in the situation in which she may be placed"; and the court also adds to this the definition in the last cited case: Hoxie v Pacific Mut. Ins. Co., 7 Allen (Mass.), 211, per Bigelow, C. J. "A ship is seaworthy when reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy": Deering's Annot. Civ. Code Cal., sec. 2682; "A warranty of seaworthiness extends, not only to the condition of the structure of the ship itself, but requires that it is properly laden and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables and anchors, cordage and sails, food, water, fuel, lights, and other necessary or proper stores and implements for the voyage": Deering's Annot. Civ. Code Cal., sec. 2684.

[47] Myers v. Girard Ins. Co., 26 Pa. St. 192.

[48] Quebec M. Ins. Co. v. Commercial Bank of Canada, 3 L. R. P. C. 234; 39 L. J. P. C. 53; 7 Moore P. C., N. S., 1.

[49] McAdams v. Leverich, 35 Fed. Rep. (annoted case). See the Director, 34 Fed. Rep. 57 (annotated case); 36 Fed. Rep. 335.

[50] Fontaine v. Phœnix Ins. Co., 10 Johns. (N. Y.) 58; cited in 1 Duer (N. Y.), 175; 3 Rob. 208, 476.

[51] Woolf v. Claggett, 3 Esp. 258.

[52] Pope v. Swiss Lloyd Ins. Co., 4 Fed. Rep. 153; Wilkie v. Geddes, 3 Dow. 57.

[53] Fontaine v. Phœnix Ins. Co., 10 Johns. (N. Y.) 48.

age,[54] and must be sufficiently tight, staunch, and strong to resist the ordinary action of the seas, without injury to her cargo;[55] and she should be sufficiently seaworthy as to be able to encounter ordinarily rough weather, without being compelled to jettison her deck cargo,[56] nor must she be unduly laden or overloaded.[57] It is held, however, that reference must be had to the capacity of the boat or craft, and not to the depth of the river over the shoals or bars.[58] So improper stowage of her cargo or furniture, whereby it becomes displaced, and the ship injured or lost, makes her unseaworthy. Usage may, however, be a factor in determining what is proper stowage.[59] And the requirement of seaworthiness is held to extend to boats or lighters necessarily and customarily used in transporting goods across the isthmus in a voyage from New York to Chagres, and thence across the isthmus to California, but this is on the ground of three distinct voyages,[60] although it has also been declared that it does not extend to lighters for transshipment of goods to the shore.[61] So the ship is unseaworthy if her condition is "rotten," although she might have performed the voyage in good weather.[62] So negligence in not properly calking a deck may make the vessel unseaworthy,[63] and a vessel is unseaworthy where her "timbers" are decayed and ironwork loose,[64] if her sails are defective,[64a] or if the compass is defective, whereby

[54] Howard v. Orient Mut. Ins. Co., 2 Rob. (N. Y.) 539.

[55] The Lillie Hamilton, 18 Fed. Rep. 327; Wilkie v. Geddes, 3 Dow, 57.

[56] Daniels v. Harris, L. R. 10 Com. P. 1.

[57] Weir v. Aberdeen, 2 Barn. & Ald. 320; Cincinnati etc. Ins. Co. v. May, 20 Ohio, 211.

[58] Cincinnati etc. Ins. Co. v. May, 20 Ohio, 211. This case may be questioned so far as it is qualified by the depth of the water.

[59] Kopetoff v. Wilson, L. R. Q. B. D. 377. See, also, Weir v. Aberdeen, 2 Barn. & Ald. 320; Chase v. Eagle Ins. Co., 5 Pick. (Mass.) 51; Warren v. Manufacturers' Ins. Co., 13 Pick. (Mass.) 518.

[60] Van Valkenburg v. Astor Mut. Ins. Co., 1 Bosw. (N. Y.) 61.

[61] Lane v. Nixon, L. R. 1 Com. P. 412.

[62] Hudson v. Williamson, 3 Brev. (S. C.) 342.

[63] The Thomas Melville, 31 Fed. Rep. 486.

[64] Douglass v. Scougall, 4 Dow, 269.

[64a] Wedderburn v. Bell, 1 Camp. 1.

it is rendered unsafe and unsuitable for use.[65] So the manner of a vessel's construction and materials may enter into the question of seaworthiness,[66] and a vessel constructed for inland navigation must be made as far as possible seaworthy for sea service, if insured therefor:[67] and if she is originally seaworthy, it makes no difference that the peril was an extraordinary one, which she was not built to encounter.[68] So the ship may be unseaworthy where her timber holds are defective.[69] And it is held that the vessel must be in a condition to carry a full cargo.[70] So sufficient anchors and cables are necessary;[71] but an anchor is not necessary to the seaworthiness of a flatboat navigating the Mississippi river.[72] So sailing with insufficient ballast makes the vessel temporarily unseaworthy.[73] But the fact that a vessel during a storm lends a cable and small anchor to another vessel, and is afterward driven ashore, does not necessarily make her unseaworthy, and the jury having found for the insured, the verdict was not disturbed.[74] The implied warranty of seaworthiness has also been held to extend to the sufficiency of a tugboat employed in towing the insured boats,[75] but the fact that the towing ropes were decayed is held no evidence of unseaworthiness.[76] A party insuring a floating dock warrants that it is seaworthy and fit for the work for which it is de-

[65] Richelieu & O. Nav. Co. v. Boston M. Ins. Co., 136 U. S. 408; 10 Sup. Ct. Rep. 934. See M'Closkie v. Glasgow & C. M. Ins. Co., 6 C. C. S. 2.

[66] Watt v. Morris, 1 Dow, 32; Bell v. Reed, 4 Binn. (Pa.) 127.

[67] Turnbull v. Janson, 36 L. T., N. S., 635. See Clapham v. Langton, 34 L. J. Q. B. 46; Knill v. Hooper, 2 Hurl. & N. 277; 26 L. J. Ex. 377; Burgess v. Wickham, 3 Best & S. 669; 33 L. J. Q. B. 17.

[68] Lockwood v. Sauganus Ins. Co., 46 Mo. 71.

[69] Standard Refinery Co. v. Schooner Centennial, 2 Fed. Rep. 409.

[70] Abbott v. Broome, 1 Caines (N. Y.), 292.

[71] Wilkie v. Geddes, 3 Dow, 57. See Harrison v. Douglass, 3 Ad. & E. 396.

[72] Donnally v. Merchants' Mut. Ins. Co., 28 La. Ann. 939; 26 Am. Rep. 129.

[73] Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303. See Merchants' Mut. Ins. Co. v. Sweet, 6 Wis. 670.

[74] Patrick v. Commercial Ins. Co., 11 Johns. (N. Y.) 9.

[75] Merchants' Ins. Co. v. Alger, 31 Pa. St. 446. This is certainly a broad extension of the doctrine of seaworthiness.

[76] Stone v. Aberdeen Ins. Co., 11 C. C. S. 1041.

signed, properly equipped with efficient machinery, and protected against accidents from the ordinary effects of water.[77] But a tug, although she may be rendered unseaworthy for propelling herself, by reason of breaking a shaft, may nevertheless be seaworthy for being towed to her home port.[78] A vessel is not unseaworthy from failure to carry a ship's carpenter on a voyage from New York to Liverpool.[79] Nor is the amount of premium paid a factor to be considered in determining the degree of seaworthiness of the vessel.[80]

§ **2162. Effect of Noncompliance with Statute.**—The stowing on deck of the water on board a vessel does not make her unseaworthy, nor cast the burden of proof upon the assured to show her seaworthiness, although such act is contrary to the statute of the United States of 1790,[81] requiring all vessels bound on a voyage across the Atlantic to have on board, secured under deck, a certain quantity of water, and imposing a penalty on the master or owner in case the crew or passengers are put on short allowance through failure to comply with its requirements.[82] It is also held that the noncompliance with a statute does not make the vessel per se unseaworthy,[83] and it is held that the noncompliance with a statute as to the complement of men required may be excused when compliance is impossible.[84]

§ **2163. Effect of Usage upon Seaworthiness of Foreign Vessel in Foreign Port.**—If a policy is taken out upon a vessel belonging to a foreign country, it has been de-

[77] Marcy v. Sun Ins. Co., 11 La. Ann. 748.

[78] Union Ins. Co. v. Smith, 8 Sup. Ct. 534.

[79] Walsh v. Washington etc. Ins. Co., 3 Rob. (N. Y.) 203.

[80] Hoxie v. Home Ins. Co., 32 Conn. 21; 85 Am. Dec. 240.

[81] Chap. 56, sec. 9.

[82] Warren v. Manufacturers' Ins. Co., 13 Pick. (Mass.) 513; 25 Am. Dec. 341; Deshon v. Merchants' Ins. Co., 11 Met. (Mass.) 199. See Cunard v. Hyde, El. B. & E. 670; 2 El. & E. 1; Redmond v. Smith, 7 Man. & G. 457.

[83] Sherlock v. Globe Ins. Co., 1 Cin. Sup. Ct. (Ohio) 193. See, also, sec. 2168, herein, as to employment of pilot.

[84] Stewart v. Powell, 1 Barn. & Adol. 266; 8 L. J. K. B. 391.

clared by high authority that the underwriter must be assumed to be cognizant of the common usages of trade in the foreign country or of the port to which the vessel belongs, as to the equipment of vessels of that class for the intended voyage.[85] This ruling is approved by Mr. Arnould, Mr. Maclachlan, Mr. Phillips, and Mr. Parsons.[86] And it is held that where the owner in New York of a vessel, which was there at the time of effecting the policy, obtained an insurance thereon from an underwriter in Boston, and described the vessel as a "coppered" ship, that term should be construed according to the usages of the port of New York, and not those of Boston, on the ground that the assured could not be presumed to know the usages of the port of Boston.[87] Where a bark was insured from Clyde to Havana, and it was usual in Nova Scotia, where she was built and belonged, to have only one suit of sails for boats of that class, it was held that as the place of making and enforcement of the contract was Scotland, the custom of Greenock must prevail, as to the degree of seaworthiness, in respect to what constituted sufficient sails for a vessel of that character for the voyage insured.[88]

§ **2164. Manning Vessel.**—It is one of the requirements of the implied warranty of seaworthiness that the ship shall, at the commencement of the voyage, be sufficiently manned by a master, officers, and crew of competent skill and ability to navigate her. If the warranty is not complied with in this respect, the policy will be avoided,[89] even though it be exceedingly difficult or even impossible to obtain such suffi-

[85] Tidmarsh v. Washington Ins. Co., 4 Mason (U. S.), 439, per Story, J.

[86] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 677, *675; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 670; 1 Phillips on Insurance, 3d ed., 391, sec. 719; 1 Parsons on Marine Insurance, ed. 1868, 386.

[87] Hazard v. New England M. Ins. Co., 8 Pet. (U. S.) 557; reversing 1 Sum. (C. C.) 218.

[88] Cook v. Greenock Mut. Ins. Co., 5 C. C. S. 246; 15 Scot. Jur. 611.

[89] Silva v. Low, 1 Johns. Cas. (N. Y.) 184; Caldwell v. Western etc. Ins. Co., 19 La. 42; 36 Am. Dec. 667; M'Lanahan v. Universal Ins. Co., 1 Pet. (U. S.) 183; Draper v. Commercial Mut. Ins. Co., 4 Duer (N. Y.), 234; The Gentleman, Ole. Adm. 110; St. Louis Ins. Co. v.

cient crew.[90] The master must be of competent skill, prudence, and discretion. An unusual degree of skill, however, is not required; it is sufficient if he has ordinary prudence and skill, reference being had to the navigation and voyage intended,[91] and it is also held that he must be of general good character, although facts or information as to his carelessness, extravagance, or want of economy are not material to the risk of barratry, and need not be disclosed.[92] If a departure from the course of the voyage is the result of not employing a master of the requisite skill, the underwriter is discharged.[93] The rule as to competency of the master has been very strictly enforced in one case, where it was held that there was a breach of the warranty of seaworthiness where the master was incompetent, although the navigation of the vessel was under the entire charge of a competent navigator and sailing master, and it was not intended that the master should have any part in navigating the ship.[94] The warranty of seaworthiness in respect to master, officers, and crew is not broken by laying the boat on the dock for repairs and giving her over to the control of workmen or laborers,[95] nor is the warranty broken by the occasional temporary absence of one of the crew to procure water or provisions, or upon other duties incidental to the voyage, especially where the loss is in no way attributable thereto;[96] nor is it requisite that the vessel should be

Glasgow, 8 Mo. 713; 41 Am. Dec. 661; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270.

[90] The Gentleman, Olc. Adm. 110; Forshaw v. Chabert, 3 Brod. & B. 158; 6 Moore, 369.

[91] Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; 16 Am. Dec. 303; Walden v. New York Firemen's Ins. Co., 12 Johns. (N. Y.) 128; affirmed, 12 Johns. (N. Y.) 513; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; 41 Am. Dec. 661.

[92] Walden v. New York Firemen's Ins. Co., 12 Johns. (N. Y.) 128; affirmed, 12 Johns. (N. Y.) 513.

[93] Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; 16 Am. Dec. 302.

[94] Draper v. Commercial Mut. Ins. Co., 4 Duer (N. Y.), 234; 21 N. Y. 378.

[95] St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; 41 Am. Dec. 661.

[96] Caldwell v. Western Ins. Co., 19 La. 42; 36 Am. Dec. 667; Busk v. Royal Exch. Assur. Co., 2 Barn. & Ald. 73, per Bayley, J.; Lapene v. Sun Mut. Ins. Co., 8 La. Ann. 1.

officered and manned when laid up in port,[97] and a mate is sufficient for a vessel frozen up for the season.[98] And the warranty, even though arising from express stipulation, may be affected by usage; as in case of a custom to discharge a part of the hands employed on a flatboat before the termination of the voyage.[99] It is undoubtedly true that different degrees of seaworthiness exist in reference to the competency of the officers and sufficiency of the crew as in other cases, for one voyage may necessitate a greater degree of competency and discretion and nautical knowledge than another,[100] and it is declared that there must be sufficient skill in the captain and crew for the purposes of the voyage insured, and if loss results from the employment of a master not acquainted with the usual course of navigation on the insured voyage, and so far incompetent as to be unable to safely navigate the vessel through ordinary perils of the voyage, she is unseaworthy.[101] So a master and one hand is held insufficient to navigate a vessel of about thirty-five tons' burden on a voyage from New York to Edenton, South Carolina.[102] The crew must, at the time of sailing on the voyage, be adequate and competent to perform the usual duties and meet the ordinary perils to which the vessel may be exposed on that voyage.[103]

§ 2165. Whether Inferior Officers must be Competent to Fill Master's Position.—As high an authority as Chief Justice Shaw declares that "a vessel cannot be deemed seaworthy which has not on board some person capable of navigating her besides the master," and that it is presumed that a mate is appointed who is competently skilled to take the office of master in case of emergency,[104] relying upon an

[97] Bell v. Western etc. Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542.

[98] Busk v. Royal Exch. Assur. Co., 2 Barn. & Ald. 73.

[99] Grant v. Lexington etc. Ins. Co., 5 Ind. 23; 61 Am. Dec. 74.

[100] See Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270.

[101] Tait v. Levi, 14 East, 481.

[102] Dow v. Smith, 1 Caines (N. Y.), 32.

[103] Henseter v. Potts, Selw. N. P. 1031, per Lord Ellenborough; Hucks v. Thornton, Holt N. P. 30; Forshaw v. Chabert, 3 Brod. & B. 158; Shore v. Bentall, 7 Barn. & C. 798.

[104] Copeland v. New England M. Ins. Co., 2 Met. (Mass.) 132.

English decision substantially to that effect, the case being a policy upon an East India voyage, where the question whether the vessel was properly manned for an East India voyage was left to the jury.[105] It certainly would not seem unreasonable to require the enforcement of such a rule in case of steamships and other large vessels, or in cases where the voyage is a long one, although it is an extension of the rule as generally understood and received, and it could be urged that a requirement resting upon an implied warranty ought to be so well established that the contract may be deemed to have been made in reference thereto.[106]

§ 2166. Whether Vessel must when She Sails have a Full Complement of Men engaged for Whole Voyage.—The warranty of seaworthiness generally contemplates that when a vessel sails on her voyage she must then have a full complement of men sufficient for the whole of that particular voyage, and this is evidently the English rule strictly enforced, except possibly in those cases where a liberty is reserved to touch and stay in the course of the voyage; it being also held that the fact that the deficiency was supplied in due course of the voyage did not aid assured.[107] And in this country where at

[105] Clifford v. Hunter, 1 Moody & M. 103; 3 Car. & P. 61.

[106] See 3 Kent's Commentaries, 5th ed., 287, n.; The Niagara v. Cordes, 21 How. 7; Gillespie v. Forsyth, 2 L. R. Q. B. (Quebec) 257; Draper v. Commercial Ins. Co., 4 Duer (N. Y.), 234; 21 N. Y. 378; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270; M'Lanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 685, 686, *683; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 675. "The skill in navigation of the master or other persons on board requisite to seaworthiness must depend upon the particular voyage": 1 Phillips on Insurance, 3d ed., 385, sec. 708.

[107] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 687, 688, *684; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 676, 677; citing Forshaw v. Chabert, 3 Brod. & B. 158; 6 Moore, 369. In this case the policy was "at and from" on a homeward risk. The full complement of men required was ten, but owing to the loss of some of the crew and inability to obtain others, the vessel sailed with only eight men engaged for the whole voyage and two for a part of the voyage. The captain landed the two men at the place agreed and shipped two others for the remainder of the voyage, and the vessel

the time of sailing the crew consisted of but ten persons, and the master intended to stop at a specified place to procure seamen, and before that point was reached the ship foundered, it was held that the intention to stop evidenced either that the crew was not sufficient, or that they were not engaged for the whole voyage.[108] But the rule is qualified in those cases where a different complement of men is required for different parts of the voyage or stages of the navigation.[109] The general rule would, therefore, subject to such qualifications as are above noted, be probably enforced in this country.[110] In applying the rule, however, it should be remembered that the English doctrine as to subsequent seaworthiness differs from that in this country, and that under a policy "at and from" a question has arisen whether, if an unseaworthiness exists at the time of sailing, it may be remedied before loss; therefore, if the vessel's complement of men be sufficient for a voyage to an intermediate port, although not engaged for the whole voyage, and it is almost certain at the time of sailing that the defect could be and it is remedied there before loss, such facts might be entitled to much consideration. Usage may also be an important factor. The fact that the steamer did not carry a night crew on a run that was to be made wholly by daylight does not tend to show that the steamer was unseaworthy.[111]

§ 2167. Negligence or Misconduct of Master or Crew —Continuing Warranty.—If the assured has employed a

was held unseaworthy because the ten men had not been engaged for the whole voyage. Mr. Phillips criticises this case on the ground that as some of the hands were lost at the loading port, the master could employ necessary means to remedy the deficiency, and also that the warranty is less strictly construed where the voyage commences from a foreign port: 1 Phillips on Insurance, 3d ed., 387; citing Cruder v. Philadelphia Ins. Co., 2 Wash. (C. C.) 262; Morteux v. Lend Assur. Co., 1 Atk. 545, etc.

[108] Silva v. Low, 1 Johns. Cas. (N. Y.) 184. See, also, Cruder v. Philadelphia Ins. Co., 2 Wash. (C. C.) 262.

[109] Dixon v. Sadler, 5 Mees. & W. 405, per Parke, B.; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270.

[110] See Cruder v. Philadelphia Ins. Co., 2 Wash. (C. C.) 262.

[111] Louisville Ins. Co. v. Monarch (Ky. C. A. 1896). 36 S. W. Rep. 564.

competent master and crew, and the vessel at the beginning is seaworthy in this respect, the warranty is complied with, for the assured does not warrant that they shall continue to do their duty, and if the loss has been immediately caused by a peril insured against, the underwriters are liable, even though unseaworthiness subsequent to the sailing may have arisen primarily from the negligence, carelessness, or other misconduct of the master and crew, and though the loss may be remotely caused thereby, and this is true whether the fault be of omission or commission, and whether the insurance be against barratry or not. In brief, the insurers are liable for a loss remotely arising from negligence of the master and mariners, but proximately from a peril insured against.[112] Thus, it does not avail the underwriter that if the master and crew

[112] Copeland v. New England Ins. Co., 2 Met. (Mass.) 432; Mission Ins. Co. v. Glasgow, 8 Mo. 725; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; 41 Am. Dec. 661; Louisville Underwriters v. Penn. 93 Ky. 96; 19 S. W. Rep. 10; 21 Ins. L. J. 493; Sperry v. Delaware Ins. Co., 2 Wash. (C. C.) 243; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222; The Titania, 19 Fed. Rep. 101; M'Lanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184, per Story, J.; Columbia Ins. Co. v. Lawrence, 10 Pet. (U. S.) 517; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351; Phœnix Ins. Co. v. Cochran, 51 Pa. St. 143; Georgia Ins. & Trust Co. v. Dawson, 2 Gill (Md.), 365; Firemen's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; Henderson v. Western M. & F. Ins. Co., 10 Rob. (La.) 164; American Ins. Co. v. Insley, 7 Pa. St. 223; Redman v. Wilson, 14 Mees. & W. 476; 14 L. J. Ex. 333; Dixon v. Sadler, 5 Mees. & W. 405, per Parke, B.; 8 Mees. & W. 895; cited Wilton v. Atlantic Royal Mail Steam Co., 10 Com. B., N. S., 465; 100 Eng. C. L. 465; citing Busk v. Royal Exch. Co., 2 Barn. & Ald. 72; Walker v. Maitland, 5 Barn & Ald. 171; Holdsworth v. Wise, 7 Barn. & C. 791; Bishop v. Pentland, 7 Barn & C. 219; Shore v. Bentall, 7 Barn. & C. 798, n. See Orient Ins. Co. v. Adams, 123 U. S. 67; Germania Ins. Co. v. Sherlock, 25 Ohio St. 33; Waters v. Louisville Ins. Co., 11 Pet. (U. S.) 222, per Story, J.; Parkhurst v. Gloucester Mut. F. Ins. Co., 100 Mass. 301; 1 Am. Rep. 105; Davidson v. Bernard, 4 L. R. C. P. 117; 38 L. J. C. P. 73; Mathews v. Howard Ins. Co., 11 N. Y. 1; Phœnix Ins. Co. v. Erie & W. T. Co., 117 U. S. 312; Lawrie v. Douglass, 15 Mees. & W. 746; Phillips v. Nairne, 4 Com. B. 343, 350; Carruthers v. Lydebotham, 4 Maule & S. 77; Corcoran v. Gurney, 1 El. & B. 456. There are decisions in conflict with so much of the above rule as relates to unseaworthiness and neglect to repair, as noted hereafter under this section. See secs. 2741-44, herein, "Barratry."

had acted with proper diligence the loss by fire might have been averted and the cargo saved, nor does the fact that the fire originated from the master's carelessness prevent recovery,[113] nor is it material that the boat was negligently managed where the loss arose from an explosion of the boilers.[114] And where the captain, the vessel being aground, ordered brandy in barrels loaded on deck to be thrown overboard, and the crew, not being able to do this, knocked in the barrel heads, it was held that the loss was by the perils of the sea, and that there was no such unskillfulness or misconduct of the master as would excuse the insurers.[115] Nor does it avail the underwriter that the negligence and carelessness of the officers and crew was the remote cause of an explosion of a powder magazine and consequent loss of the ship.[116] And where the vessel puts into a port in distress, it is held that the insured is not liable for the improper exercise of judgment in putting out to sea in an unseaworthy condition, for the master and mariners are not the servants of the assured.[117] In a Massachusetts case, however, a distinction is made between the acts of the master, officers, and crew in their own proper sphere in navigating the vessel, and the master's acts as agent or representative of the owner of the vessel, holding that the rule is limited to acts of negligence or misconduct in the first case, and not to those acts in the latter.[118] But if such a distinction exists, exactly where the line should be drawn would be a difficult matter to determine, although an exception to the rule might arise, so far as the doctrine of the cases in this country would require the master to make repairs where the ship becomes unseaworthy during the voyage to which the

[113] Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222.

[114] Perrin v. Protection Ins. Co., 11 Ohio, 147; overruling Lodwicks v. Ohio Ins. Co., 5 Ohio, 432, and other decisions in that state.

[115] Van Eyckel v. The Ewing, Crabbe Adm. 405.

[116] Waters v. Merchants' Ins. Co., 11 Pet. (U. S.) 213; 1 McLean (C. C.), 275; Mathews v. Howard Ins. Co., 11 N. Y. 9; overruling Green v. Phœnix Ins. Co., 13 Johns. (N. Y.) 451.

[117] Briose v. Pacific Mut. Ins. Co., 4 Daly (N. Y.), 246; citing the cases in the last note and Redman v. Wilson, 14 Mees. & W. 476.

[118] Copeland v. New England M. Ins. Co., 2 Met. (Mass.) 432; 1 Phillips on Insurance, 3d ed., 402, sec. 732.

insurance relates. There are also decisions in conflict with the principal rule first above stated.[119] Notwithstanding the general rule above noted, the provisions of the California code that under an insurance for a specified length of time the ship must be seaworthy at the commencement of every voyage she may undertake during that time, and also that either party may rescind for the violation of a material warranty or other material provision of the policy by either party thereto, are material factors bearing upon the question, which would probably change the rule there so far as policies for a specified time are concerned.[120]

§ **2168. Employment of Pilot.**—The employment of a pilot goes to the question of seaworthiness,[121] and it is held that the insurer may defend on the ground that the vessel did not have a pilot.[122] But in determining to what extent it enters into such question, reference must be had to the law and usage, as a factor entering into the safe navigation of the vessel, and also to the circumstance whether the port is one of departure or entry, or an intermediate port. In accordance with the rule stated under the preceding section herein, if the vessel have a competent master and crew at the commencement of the voyage, a doubt would be raised whether the master's negligence in subsequently failing to employ a pilot at an intermediate port or ports of entry would excuse the underwriters, provided a peril insured against was the proximate cause of loss, although it is declared that if the nonemployment of a pilot at an intermediate port is only the remote cause of the loss, where the vessel was originally seaworthy, the master being of competent skill, the insurers are nevertheless liable.[123] But it is also declared that this doctrine is

[119] See Law v. Hollingsworth, 7 Term Rep. 160; overruled in Sadler v. Dixon, 5 Mees. & W. 405; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; American Ins. Co. v. Bryan, 26 Wend. (N. Y.) 563; 1 Hill (N. Y.), 25; Alcock v. Royal Exch. Assur. Co., 13 Q. B. 292; Cleveland v. Union Ins. Co., 8 Mass. 308.

[120] Deering's Annot. Civ. Code Cal., secs. 2610, 2683.

[121] Lapene v. Sun Ins. Co., 8 La. Ann. 1.

[122] Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 70.

[123] Phillips v. Headlam, 2 Barn. & Adol. 380.

subject to the qualification that if an act of parliament requires the employment of a pilot, it is necessary.[124] And, under the merchant shipping acts of England of 1854 and 1862, if the assured, says Mr. Maclachlan, were to sail without a licensed pilot, the policy would be vitiated, whether on goods or on the ship, when the assured is a party to the illegality.[125] So it is held in this country that the presumption of unseaworthiness, arising under a statute, from a foreign vessel leaving the port of New York without a licensed pilot is not rebutted by the fact that she was taken out of port in safety by the master.[126] But in another case it is held that a statutory unseaworthiness is not established by a statute requiring an outward bound vessel to employ a licensed pilot under penalty for noncompliance, and that the underwriter is not excused by the mere refusal of the master to receive on board a pilot, even though the loss occurs in pilot ground, but that the question of seaworthiness depends upon the circumstances, such as usage of the port and the master's ability to pilot his own vessel.[127] So it is held that a schooner is not rendered unseaworthy by sailing up the Potomac without a licensed pilot, where her mate is acting as pilot, and is a skillful man, it being customary for mates to pilot vessels of her size in such cases, and this even though the statute prohibited other than properly licensed pilots from acting.[128] So in the case of a government vessel, she is not prima facie unseaworthy from the fact that the officers navigating her are not licensed pilots.[129] And recovery was had where a pilot was on board, although not licensed.[130] So a recovery was had where a pilot was not employed by a vessel entering a harbor, the loss occurring at a point where the pilot was usually

[124] Hollingsworth v. Broderick, 7 Ad. & El. 44, per Patterson, J.

[125] 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 696.

[126] Bosland v. Mercantile Mut. Ins. Co., 46 N. Y. Sup. Ct. 433, under Laws N. Y. 1857, c. 242.

[127] Flannigan v. Washington Ins. Co., 7 Pa. St. 306, under Pa. Stats. 1803.

[128] Keeler v. Fireman's Ins. Co., 3 Hill (N. Y.), 250.

[129] Hathaway v. St. Paul F. & M. Ins. Co., 1 McCrary (C. C.) 25; 1 Fed. Rep. 197.

[130] Domingo v. Merchants' Mut. Ins. Co., 19 La. Ann. 479.

dismissed and beyond that place at which the aid of a pilot was desirable.[131] But if a vessel is about to enter a harbor where the approaches are difficult of access, and where not only nautical skill but local knowledge and experience thereof is required, and pilots are to be had, and the usage is to take pilots on board, it is held that the law is not satisfied as to seaworthiness unless a pilot is employed.[132] So the question as to a custom exempting an assured from providing a branch pilot in the coasting trade from North Carolina is declared to be one of fact, both as to its existence and reasonableness.[133] It is also decided that the master is bound to secure the services of a pilot when entering a foreign port where pilots are employed, and must approach pilot ground with caution, and that the underwriter's liability ceases upon failure to employ a pilot on the part of the owner or his agents, where a pilot's services are necessary to avoid danger.[134] And that as the captain has, upon coming out of a harbor, the power to procure a pilot, he is obligated to do so, especially where usage requires a pilot. But it is held in another case that the neglect to employ a pilot discharged the insurers when the loss was a direct and immediate consequence of the neglect, but not otherwise.[135] If a competent pilot is received on board, and the navigation of the vessel given into his charge, the warranty would undoubtedly be complied with as to seaworthiness.[136] It will be seen from the above cases that there is much doubt whether the nonemployment of a pilot constitutes such unseaworthiness as to relieve the insurers, except perhaps when law and usage require one to be taken in going out of a port, or where the nonemployment is the proximate cause of the loss. We would suggest that a possible ground

[131] McMillan v. Union Ins. Co., 1 Rice (S. C.) 248; 53 Am. Dec. 112.

[132] Whitney v. Ocean Ins. Co., 14 La. 485; 33 Am. Dec. 595; Thomson v. Bessett, 4 C. C. S. 670. See Van Syckel v. The Ewing, Crabbe Adm. 405, and examine De Pau v. Jones, 1 Brev. (S. C.) 437.

[133] Cox v. Charleston etc. Ins. Co., 3 Rich. (S. C.) 331; 45 Am. Dec. 771.

[134] McDowell v. General M. Ins. Co., 7 La. Ann. 684; 56 Am. Dec. 619.

[135] McMillan v. Union Ins. Co., 1 Rice (S. C.) 248; 53 Am. Dec. 112.

[136] Law v. Hollingsworth, 7 Term Rep. 160.

for a solution of the question may exist in the fact that the warranty of seaworthiness relates to the condition of the ship, and its equipment and fitness for port or for the voyage, and that the employment of a pilot is a mere temporary condition, relating merely to the ship's temporary navigation within certain limits.

§ **2169. Warranty may be Superseded by Stipulation —Waiver and Estoppel.**—The warranty of seaworthiness may be superseded by stipulation, or by acts or declarations of the assurer operating as a waiver or estoppel. Thus, the underwriters may agree that the ship is seaworthy for the voyage, which will dispense with the ordinary warranty and render the insurers liable for loss, even from latent defects not aggravated by ordinary perils.[137] And if at the time of issuing the policy the insurer knows that the vessel is unseaworthy, and elects to continue the risk and take the entire premium, whereby the assured is induced to rely upon the belief that the insurance is in force, this estops the underwriter from avoiding the contract after a loss on the ground of unseaworthiness. A case of this character differs, however, from one where the underwriter has reasonable means and opportunity of ascertaining the facts, but has no knowledge thereof,[138] and it is also to be distinguished from one where the assurer is as well acquainted with the state and condition of the ship, as the owner, and has equal opportunity for judging as to her unseaworthiness, but does not know the vessel is unseaworthy.[139] An advertisement that the company would insure goods on certain enumerated boats amounts to a waiver of the implied warranty of seaworthiness.[140] If it be stipulated that vessels used by assured shall be approved by the assurer, the certificate of the assurer's inspector approving a vessel constitutes an admission of seaworthiness, which

[137] Parfitt v. Thompson, 13 Mees. & W. 392; 14 L. J. Ex. 73.

[138] Hoxie v. Home Ins. Co., 32 Conn. 21; 85 Am. Dec. 240.

[139] Oliver v. Cowley, reported in 1 Marshall on Insurance, ed. 1810, *161.

[140] Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340; 41 Am. Dec. 592.

supersedes the ordinary warranty.[141] So after the vessel has sailed the assurers, having knowledge of her unseaworthiness, may waive the fact of breach of the warranty, and contract that the same may be remedied, and thereby render themselves liable to the same extent as if the vessel had been originally seaworthy.[142] But it cannot be held that the fact of seaworthiness, as a condition precedent, is waived or ceases to be a condition, if the unseaworthiness has been created by the intentional wrong of the master.[143]

§ 2170. **Seaworthiness—Estoppel Against Insurer—Certificate of Board of Underwriters.**—If an inspector of a local board of underwriters, to which the insurer belongs, issues, shortly prior to the attachment of the risk, and delivers to the manager of the insured, a certificate that he has made a thorough examination of the barge in question, and has found her in good order, and well conditioned, privileged to carry certain goods and merchandise to a certain amount on certain waters, and that goods and merchandise shipped on her will be insured at the usual rates of premium by the insurers composing said local board of underwriters for a specified time, subject to reinspection at any time, said certificate estops said insurer to question the seaworthiness of the barge, as against a shipper of the goods specified, who has relied thereon in making said shipments and in effecting said insurance.[144]

§ 2171. **Successive Voyages or Stages of the Voyage.** If a voyage consists of different parts, and not one entire voyage, or if there be successive stages before the vessel sails on her main voyage, a different complement of men or a different degree of seaworthiness may be sufficient for the several voyages, or for each stage of the voyage, but the vessel

[141] Marine F. Ins. Co. v. Burnett, 29 Tex. 433.

[142] Weir v. Aberdeen, 2 Barn. & Ald. 320; Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 244, per Lord Penzance.

[143] Borland v. Mercantile Mut. Ins. Co., 14 Jones & S. (46 N. Y. Super. Ct.) 433.

[144] Western Assur. Co. v. Southern Cotton Oil Co., 16 U. S. C. C. A. 67; 68 Fed. Rep. 924.

must be seaworthy for each voyage, or for each successive stage of a voyage, in a degree commensurate with her then risk.[145] Where the first part of the voyage is river navigation and the subsequent part a sea voyage, the vessel must, upon sailing on the latter, be seaworthy therefor.[146] If the ship may at her election pursue any part of her voyage she may choose, it is sufficient if she has a competent crew for such part of the adventure; as where the voyage was both sealing and whaling, and she pursued only sealing, for which purpose she had a sufficient crew, she was held seaworthy.[147] If the risk is to commence from the loading of the cargo on board ship at and from different ports, whereby there are separate voyages and different shipments therefor, the vessel must be seaworthy for each voyage.[148] It may be a question whether the voyage is entire or consists of separate voyages. If it be the former, the rule does not apply, although the voyage may consist of different parts.[149] This rule is, however, subject to such qualifications as exist in this country under the rules relating to continuing seaworthiness and repairs. The California code provides that "where different portions of the voyage contemplated by a policy differ in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with if, at the commencement of each portion, the ship is seaworthy with reference to that portion."[150]

§ 2172. To What Time the Warranty of Seaworthiness Refers.—To what time the warranty of seaworthiness re-

[145] Dixon v. Sadler, 5 Mees. & W. 405, per Parke, B.; Bell v. Read, 4 Binn (Pa.) 127; Bouillon v. Lupton, 33 L. J. C. P. 37; 15 Com. B. 43; 109 Eng. C. L. 113; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270; Cobb v. New England Mut. Ins. Co., 6 Gray (Mass.), 192; Oliverson v. Loughman, cited 2 Barn. & Ald. 322; Lane v. Nixon, L. R. 1 C. P. 412. As to seaworthiness where voyage consists of different stages, see article in 48 L. T. 84; 2 Chic. Leg. News, 107.

[146] Quebec M. Ins. Co. v. Commercial Bank of Canada, L. R. 3 C. P. 234.

[147] Hucks v Thornton, 1 Holt N. P. 30, per Gibbs, C. J.

[148] Biccard v. Shepherd, 14 Moore P. C. 471; 5 L. T., N. S., 504.

[149] See Van Valkenberg v. Astor Mut. Ins. Co., 1 Bosw. (N. Y.) 61; Holdsworth v. Wise, 1 Moody & R. 673; 7 Barn. & C. 794.

[150] Deering's Annot. Civ. Code Cal., sec. 2685.

fers depends upon the character of the risk, and it is a point which has been much discussed whether any implied warranty of seaworthiness exists in time policies. The fact has also been considered important as to whether the insurance is upon ship or goods and freight, whether the policy is "from" or "at and from," or whether the voyage is entire, or consists of different parts or stages, reference being had to seaworthiness for the voyage. These points are fully considered in the several sections under this chapter, but it may be generally stated that seaworthiness must exist, as a condition precedent, at the commencement of the voyage insured; that is, at the time the vessel sails, and if the ship is not then seaworthy, the policy is void and insurers discharged, even though the loss arises from another cause; for unseaworthiness at the time of sailing is a good defense, and neither party in such case is bound, and the premium if paid, must be returned. So also in certain cases the vessel must be seaworthy in port.[151] So it is held, both in England and in this country, that if the vessel sails in an unseaworthy condition, the underwriter is not liable, even though the vessel arrives safely at her destination.[152] But if the vessel is seaworthy when she sails, it is a sufficient compliance with the warranty, even though she is lost shortly afterwards.[153] There are exceptions, however, to the principal rule above noted, which will be hereafter considered.

§ 2173. Continuing Warranty as to Seaworthiness—The English Rule.—It seems to be settled in England that

[151] Merchants' Ins. Co. v. Morrison, 62 Ill. 242; Forshaw v. Chabert, 3 Brod. & B. 158; Wedderburn v. Bell, 1 Camp. 1, per Lord Ellenborough; Knill v. Hooper, 2 Hurl. & N. 277; 26 L. J. Ex. 377; Quebec M. Ins. Co. v. Commercial Bank of Canada, L. R. 3 C. P. 234; Leuba v. Insurance Co. of North America, 2 Wash. (C. C.) 107; Dudgeon v. Pembroke, 1 Q. B. D. Ex. 96; Porter v. Bussey, 1 Mass. 436; Christie v. Secretan, 8 Term. Rep. 198, per Lawrence, J.

[152] Stewart v. Wilson, 12 Mees. & W. 11; 13 L. J. Ex. 27; Prescott v. Union Ins. Co., 1 Whart. (Pa.) 398.

[153] Miller v. Russel, 1 Bay (S. C.), 309; Franco v. Natusch, 6 Tyrw. 401; Walsh v. Washington M. Ins. Co., 32 N. Y. 427; 3 Rob. (N. Y.) 202; Patrick v. Hallett, 1 Johns. (N. Y.) 241; Stephenson v. Piscataqua F. & M. Ins. Co., 54 Me. 55; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389; Treat v. Union Ins. Co., 56 Me. 231; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270.

no continuing warranty of seaworthiness for the voyage is implied, but that it is a sufficient compliance with the warranty if the ship be seaworthy for the voyage insured when she first sails thereon, and this rule applies, where the voyage is entire, to a sailing from an intermediate port, or from an outport during a subsequent stage of the voyage.[154]

§ **2174. Continuing Warranty as to Seaworthiness—The Rule in this Country.**—In this country the rule as to a continuing warranty of seaworthiness differs from the English rule, and is apparently in conflict with the general rule stated elsewhere, that if the loss is proximately caused by a peril insured against, the remote cause of the loss will not be a defense even though ascribable to the mere negligence of the master and crew, and even though such negligence primarily caused the unseaworthiness. We may, however, state the following as the rule which obtains here: In the absence of anything in the policy to the contrary, if a defect of seaworthiness subsequently arises, the assured or the master, or those who may, under the circumstances, be held to be his agents, must make the vessel seaworthy, or restore her to a seaworthy condition during the period of the risk, so far as the same may reasonably be done by the exercise, in good faith, of due diligence, proper care, and reasonable discretion, in

[154] Dixon v. Sadler, 5 Mees. & W. 405; 8 Mees. & W. 900, per Parke, B.; Bermon v. Woodbridge, Doug. 758, per Lord Mansfield; Houldsworth v. Wise, 7 Barn. & C. 794; Eden v. Parkinson, Doug. 755, per Lord Mansfield; Watson v. Clarke ("The Midsummer Blossom"), 1 Dow P. C. 344; Parfitt v. Thompson, 13 Mees. & W. 392; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 657, *656, sec. 244; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 652, et seq. 659. But see Phillips v. Headlam, 2 Barn. & Adol. 382; Thompson v. Hopper, 6 El. & B. 17, per Lord Campbell. Mr. Parsons states the English rule as follows: "We suppose the law in England at this time to be that if a ship which is seaworthy at the commencement of the voyage subsequently becomes unseaworthy from any cause whatever, other than the willful and wrongful act of the insured himself, this subsequent unseaworthiness will not discharge the insurer from his liability for a loss subsequent to the unseaworthiness, if that loss be the direct and proximate cause of a peril insured against": 1 Parsons on Marine Insurance, ed. 1868, 382, 383; citing Marshall on Insurance, Shee's ed., 122; Gibson v. Small, 4 H. L. Cas. 353.

view of all the circumstances, and if through a want of such prudence and diligence by assured or his agents a loss occurs, which distinctly appears to have been directly caused thereby, the assurer is not liable, although the contract is not affected as to any other risk or loss covered by the policy, nor increased or caused by, such particular defect, and if the loss is not connected with such unseaworthiness so caused, the insurer is nevertheless liable; as where the vessel is not repaired, or only temporarily repaired at an intermediate port, the master, in the exercise of good faith and reasonable discretion, under the circumstances, deeming no repairs or only temporary repairs necessary at that port, and the subsequent loss of the vessel is in no way connected with such failure to repair, the insurer is nevertheless liable. There is nothing in the above rule to prevent the assured from making out a prima facie case, by showing that the vessel was seaworthy at the commencement of the voyage.[155] In the following case, while the general rule is followed as to losses remotely caused by the negligence of the master and mariners, it is held that the insurer is discharged by proof that the efficient and direct cause of encountering the peril is the failure on the part of the assured to act in good faith toward the insurer, or to exercise ordinary prudence in the management, navigation, and care of the vessel, for the underwriter cannot be held for losses by the peril insured against directly caused by the fraud or gross misconduct of the assured; that the latter is obligated, under the warranty of seaworthiness, to exercise such a sufficient degree of care as to secure competent officers and a crew, but that the burden rests upon the underwriter to satisfy the jury, beyond a reasonable doubt, that the master designedly cast away and

[155] Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227, per Shaw, C. J.; Lapene v. Sun Mut. Ins. Co., 8 La. Ann. 1; 58 Am. Dec. 668; The Titania (S. D. N. Y.), 19 Fed. Rep. 101; McDowell v. General M. Ins. Co., 7 La. Ann. 684; 56 Am. Dec. 619; Dupeyre v. Western etc. Ins. Co., 2 Rob. (La.) 457; 38 Am. Dec. 210; Franklin Ins. Co. v. Cobb, 2 Cin. Sup. Ct. 87; Peters v. Phœnix Ins. Co., 3 Serg. & R. (Pa.) 25; Cudworth v. South Carolina Ins. Co., 4 Rich. (S. C.) 416. In this case the insured was owner and master: Starbuck v. New England Ins. Co., 19 Pick. (Mass.) 198; Union Ins. Co. v. Smith, 124 U. S. 405; 8 Sup. Ct. 53, per Blatchf. J.

destroyed his vessel in a case where the defense rests upon such facts, and that it was not the position of the party, but the character of the fact upon which the degree of proof rested.[156] So it is held that insurers are not liable for the neglect of the master in not causing the false keel to be repaired, whereby the vessel became exposed to the action of worms, which obtained entrance while in the Pacific Ocean, and destroyed the ship, and this was held to release the insurers.[157] It is held that seaworthiness is limited to the commencement of the risk, and that the insurer is not released by the fact that the vessel afterward becomes unseaworthy.[158] If the contract assumes risks only "on all cotton seed in bulk or in bags owned by the assured, or consigned to them and shipped to their address in New Orleans on board good and seaworthy steamboats and barges," there is no contract, express or implied, that after shipment the steamboat or barge shall continue in a seaworthy condition.[159] Where the owner of a river steamer contracted for her employment in respondent's service for a specified time, guaranteeing that the vessel should have the underwriter's certificate as to her seaworthiness, and it was given at the commencement of the service, but with-

[156] Shultz v. Pacific Ins. Co., 14 Fla. 73. Quære, as to the "reasonable doubt." See Woodbeck v. Keller, 6 Cow. (N. Y.) 118; Fountain v. West, 23 Iowa, 9. That preponderance of evidence is sufficient, see Marshall v. Marine Ins. Co., 43 Mo. 586; Kane v. Hibernia Ins. Co., 39 N. J. 167; Ellis v. Buzzell, 60 Me. 209; 11 Am. Rep. 204; Matthews v. Huntley, 9 N. H. 150.

[157] Hazard v. Insurance Co., 1 Sum. (C. C.) 218. See sec. 2797, and c. lviii, herein.

[158] American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 533; Peters v. Phœnix Ins. Co., 3 Serg. & R. (Pa.) 25. Under the California code an implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except, where the policy is on time, the vessel must be seaworthy at the commencement of every voyage, and except also where goods are transshipped at an intermediate port under the terms of the policy or the description of the voyage or the established custom of trade, in which latter case the vessel on which the cargo is shipped or transshipped must be seaworthy at the commencement of its particular voyage: Deering's Annot. Civ. Code Cal., sec. 2683.

[159] So declared in Western Assur. Co. v. Southern Cotton Oil Co., 16 U. S. C. C. A. 67, per Pardee, J.; 68 Fed. Rep. 924. See 16 U. S. C. C. A. 65; 68 Fed. Rep. 923.

drawn during her service, it was held that the guaranty was a continuing one, extending over the entire period of employment, not limited to the beginning thereof.[160]

§ 2175. **Continuing Warranty as to Seaworthiness—Time Policies.**—We have already considered the question whether there is any implied warranty of seaworthiness in time policies,[161] and the unsettled state of the law in that respect necessitates an inquiry whether there is a continuing warranty of seaworthiness in time policies, and if so, its extent.[162] It is held that there is an implied obligation under a time policy to keep the vessel tight, strong, and staunch as far as practicable during the voyage, although it is declared in the same case that there is no continuing warranty of seaworthiness.[163] In another case in the United States supreme court it is held that although the warranty is complied with in time policies if the vessel is seaworthy at the commencement of the risk, yet if a subsequently arising defect as to seaworthiness is, through the bad faith or want of ordinary prudence or diligence on the part of assured or his agents, permitted to continue, the insurer is discharged as to any loss directly arising therefrom, but as to the other risks or losses covered by the policy, and not increased or occasioned by unseaworthiness, the underwriter is not discharged and that if the want of ordinary care is alleged by insurer, it must be proved by him.[164] It is held, however, that where a vessel sustains a loss by a peril insured against, receives partial repairs, and makes several trips in an unseaworthy condition,

[160] Whipple v. Mississippi & Y. Packet Co., 34 Fed. Rep. 54.

[161] See secs. 2152-54, herein.

[162] "Where an insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time": Deering's Annot. Civ. Code Cal., sec. 2683.

[163] Capen v. Washington Ins. Co., 6 Ohio, 71.

[164] Union Ins. Co. v. Smith, 124 U. S. 405; 8 Sup. Ct. 534; 31 L. ed. 497, per Blatchford, J. In this case there was an exception of liability for loss consequent upon incompetency of the master and want of care and skill in navigating the vessel, rottenness, inherent defects and all other unseaworthiness. The vessel, a tug, which had sprung a leak, was made seaworthy to be towed and was attempted to be

that the insurer is not discharged, for the liability was fixed while she was seaworthy.[165] In New York, it is declared that there is an implied warranty to keep the vessel seaworthy while the risk continues, so far as "reasonably possible," and necessitates "active diligence" in this respect, but this rule, taken in connection with the other language of the court immediately preceding such declaration, must be intended to be limited to those cases where the vessel leaves the port where the vessel is insured.[166] So in another case in that state the vessel lost her small bower anchor in entering an intermediate port, and the master endeavored to replace it, but was unable to procure one of sufficient size, and set sail therefrom, unseaworthy in this respect. It was held that, having been originally seaworthy, sailing from an intermediate port in such unseaworthy condition did not discharge the underwriter.[167] In Wisconsin, it is declared that assured is obligated from time to time to keep the vessel in a condition suitable for the service required, and the underwriter is not liable if a loss is occasioned by the failure so to do; but in this case the vessel left port with insufficient ballast, which ordinary care and prudence justified procuring, and capsized, and the case was submitted to the jury.[168] It certainly is not unreasonable to require that where the vessel leaves port at the inception of the risk she should be seaworthy under a time policy,[169] and that she should be kept in that condition within the limits of the rule stated under the last section; there being nothing in the policy to warrant a different construction.[170]

§ 2176. Continuing Warranty as to Seaworthiness—Repairs.—If a vessel which is originally seaworthy be-

towed to a port of repairs and passed two other ports where she might have been repaired, and recovery for a loss occurring before she reached the intended port of repairs was had.

[165] Gazzam v. Cincinnati Ins. Co., 6 Ohio, 71.

[166] Berwind v. Greenwich Ins. Co., 114 N. Y. 234.

[167] In this case the insured vessel sustained damage from perils of the sea, but reached port and discharged her cargo: American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287.

[168] Merchants' Mut. Ins. Co. v. Sweet, 6 Wis. 670.

[169] See sec. 2098, herein.

[170] See secs. 2151-53, herein and next section.

comes unseaworthy during the voyage, and the master, who is owner of the vessel, neglects to repair her at a port of refuge or trade, or other port which he has entered, and, in consequence thereof, the vessel leaves port in an unseaworthy condition, and the loss is caused directly by such neglect, and not otherwise, the insurers are released.[171] This rule has also been extended to repairs by the master[172] where he has reasonable cause for suspecting the existence of defects, or where he has knowledge of the same, and has reasonable grounds for the belief that such repairs are necessary to enable her to proceed on her voyage,[173] or if the defect be of such a character that a prudent and discreet master of competent skill and judgment would consider it necessary to examine and repair before leaving port to continue the voyage.[174] But if a competent master, in the exercise of a reasonable discretion as a prudent man, and in good faith, omits to examine and repair the vessel, or if he partially repairs her under such conditions, deeming her seaworthy for the rest of the voyage, and runs her in an unseaworthy state, the neglect to repair does not release the insurers.[175] These decisions may probably rest upon the ground that the master is the agent or representative of the owner for the purpose of making repairs,[176] although it is directly held that the master and mariners are not the servants of the assured, so as to bind him by their negligent acts or

[171] Cudworth v. South Carolina Ins. Co., 4 Rich. (S. C.) 416; 55 Am. Dec. 692; McDowell v. General M. Ins. Co., 7 La. Ann. 684; 56 Am. Dec. 619. See Putnam v. Ward, 3 Mass. 481. "When a ship becomes unseaworthy during the voyage to which an insurance relates, an unreasonable delay in repairing exonerates the insurer from any loss arising therefrom": Deering's Annot. Civ. Code Cal., sec. 2686.

[172] Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; Jones v. Insurance Co., 2 Wall. Jr. (C. C.) 278; Merchants' Ins. Co. v. Sweet, 6 Wis. 670; Berwind v. Greenwich Ins. Co., 114 N. Y. 234; Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 308; Copeland v. New England M. Ins. Co., 2 Met. (Mass.) 432, 439, per Shaw, C. J.

[173] Starbuck v. New England M. Ins. Co., 19 Pick. (Mass.) 198.

[174] Adderly v. American Mut. Ins. Co., Taney (C. C.) 126.

[175] Gazzam v. Cincinnati Ins. Co., 6 Ohio, 71; Hathaway v. Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33.

[176] Jones v. Insurance Co., 2 Wall. Jr. (C. C.) 278; Union Ins. Co. v. Smith, 124 U. S. 405, per Blatchford, J.; Hazard v. New England M. Ins. Co., 8 Pet. (U. S.) 557; 1 Sum. (C. C.) 218, 230; Copeland v. New

improper exercise of judgment in leaving port with a vessel in an unseaworthy condition, when she was originally seaworthy.[177] The rule requiring repairs by the master has also been applied to time policies.[178] But in all the above cases the loss must have been directly attributable to the insufficiency, or master's neglect or omission to repair, and not otherwise.[179] The fact of original seaworthiness of a vessel does not constitute prima facie evidence that a necessity for subsequent repairs has arisen from some extraordinary peril.[180] If there is a condition that repairs be made to a vessel, the insured is obligated to make the necessary repairs before exposing the vessel again to the perils of navigation.[181]

§ 2177. Whether Cases as to Necessity for Repairs can be Reconciled with Other Doctrines and Cases Apparently in Conflict therewith.—It will be seen by an examination of the cases relating to seaworthiness in time policies in this country,[182] and of those relating to the negligence of the master and crew,[183] that there is an apparent want of harmony between them and the cases noted under this and the preceding section. The principal difficulty exists in the attempt to cover by the term "seaworthiness" one standard as to the fitness, equipment, and manning at the time of sailing, and another standard as to her fitness and equipment during

England M. Ins. Co., 2 Met. (Mass.) 443, per Shaw, C. J.; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 236; American Ins. Co. v. Ogden. 20 Wend. (N. Y.) 301, per Walworth, Ch.; 1 Phillips on Insurance, 3d ed., 402, sec. 732.

[177] Brioso v. Pacific Mut. Ins. Co., 4 Daly (N. Y.) 246; citing Redman v. Wilson, 14 Mees. & W. 476; Waters v. Merchants' Ins. Co., 11 Pet. 213; Matthews v. Howard Ins. Co., 11 N. Y. 9.

[178] Jones v. Insurance Co., 2 Wall. Jr. (C. C.) 278; Union Ins. Co. v. Smith, 124 U. S. 405, per Blatchford, J.; Hathaway v. Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33.

[179] Copeland v. New England M. Ins. Co., 2 Met. (Mass.) 439, per Shaw, C. J.

[180] Donnell v. Insurance Co., 2 Sum. (C. C.) 366.

[181] Hyde v. Mississippi M. F. Ins. Co., 11 La. Ann. 543; 29 Am. Dec. 465.

[182] See secs. 2153, herein.

[183] See sec. 2167, herein.

the voyage, while, in the latter case the term "seaworthiness," strictly construed, does not properly apply, for it is not an absolute seaworthiness within the meaning of that warranty, as interpreted by the courts. If we say that, independently of the warranty of seaworthiness as to the vessel, its equipment, its officers and crew, there is an implied condition or warranty that due diligence and discretion, such as a prudent man would exercise in his own affairs, shall be used to ascertain defects which unfit the vessel for continuing her voyage with reasonable safety, and also to repair her as may be necessary in the exercise of a reasonable discretion for continuing her voyage, a ground for reconciling the cases appears. The proviso, however, that if the want of repairs arising from the failure or neglect to exercise proper diligence and discretion is the direct or proximate cause of loss, then the assurer shall be released, but if the loss arises from a peril insured against, the assured may recover, since the assurer is liable where a peril insured against is the proximate cause of loss; but if the failure or neglect to repair under the conditions above stated can reasonably be said to have been the cause of loss, it is the proximate cause, even though that cause is a peril insured against. The maxim, non remota causa sed proxima spectatur, applies.[184]

§ **2178. Assurer's Approval of Ship at Port of Departure—Subsequent Repairs.**—If, under a stipulation therefor, the assurer approves of a vessel at a port of departure, and inspection is only made there, no obligation is thereby imposed upon assured to put the vessel in as good a condition at intermediate ports as she was when inspected.[185]

§ **2179. Subsequent Noncompliance as to Seaworthiness no Retrospective Effect.**—If a vessel has sailed in a seaworthy condition for the voyage, a subsequent noncompliance with the warranty cannot have a retrospective effect,

[184] See Copeland v. New England M. Ins. Co., 2 Met. (Mass.) 439, per Shaw, C. J., where a suggestion is made which could reasonably form the basis of the distinction in the text.

[185] Marine F. Ins. Co. v. Burnett, 29 Tex. 433.

so as to excuse the insurer for a loss occurring prior to such noncompliance; for the subsequent seaworthiness contemplated by the rule above noted[186] does not go to the extent of holding the warranty so far a continuing one as to be a condition precedent in this respect.[187]

§ 2180. Vessel Seaworthy for Port.—The vessel may be seaworthy for port, the degree being commensurate with her then safety, whether for temporary purposes, or moving about in the harbor, or undergoing repairs, or lying in the offing, and even though her state of repair and equipment be such as to constitute unseaworthiness for the voyage.[188] If a time policy is effected on a vessel in port, and she is seaworthy for port on the day the risk commences, the policy attaches.[189] It is held in Massachusetts that the assured on cargo or freight does not warrant that the vessel is seaworthy for the voyage at the time of taking the cargo on board, but only that she is seaworthy at the time of sailing, and that under a policy "at and from," if the goods are loaded, and the vessel having sailed is subsequently compelled to return to port, unload her cargo for repairs, and reload, that the policy attaches from the first loading, and that the underwriters are liable on the return to port and during the subsequent homeward voyage, and this extends to freight insured.[190] Notwithstanding the strong character of this authority, a different rule is asserted by Mr. Phillips, who says that the seaworthiness of the ship depends upon the uses and purposes

[186] Sec. 2174, herein.

[187] See secs. 1952-55, herein; 1 Phillips on Insurance, 3d ed., 401, sec. 730.

[188] M'Lanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184, per Story, J.; Smith v. Surridge, 4 Esp. 25; Forbes v. Wilson, reported in 1 Marshall on Insurance, ed. 1810, *155; Parmeter v. Cousins, 2 Camp. 257; Anner v. Woodman, 3 Taunt. 299; Taylor v. Lowell, 3 Mass. 331; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; Dixon v. Sadler, 5 Mees. & W. 405, per Parke, B. See chaps. xxxvii, xxxviii, herein.

[189] Hoxsie v. Pacific Mut. Ins. Co., 7 Allen (Mass.), 211. See Dallam v. Insurance Co., 6 Phila. (Pa.) 15.

[190] Taylor v. Lowell, 3 Mass. 331; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227. See Mosteux v. London Assur. Co., 1 Atk. 545, per Lord Hardwicke.

to which it is applied, and that if an insurance is upon cargo and freight, and the goods are loaded for the voyage when the ship is in so defective a state that the cargo must be relanded to make repairs, the risk does not attach on the cargo if it is to commence at the time of loading; but he adds, referring to the Massachusetts case,[191] that the noncompliance was at an intermediate stage of the risk, and there was nothing to prevent the attachment of the risk at the time of reloading upon repairs.[192] In a case where cargo was insured "at and from" North Carolina to New York, the assurers were precluded from showing that the vessel was unseaworthy prior to crossing the boundary line of North Carolina, it being held sufficient if she was then seaworthy.[193] It is also held that under an insurance "at and from," a warranty of seaworthiness must be referred to the commencement of the risk, and if between that time and the time of sailing the vessel becomes unfit for sea without the fault of the insured, and is afterward lost by the perils of the sea, the insured can recover.[194] It would undoubtedly be true, upon analogy with principles established in other cases, that if the risk commences on the cargo and freight at the first loading of the goods, that the vessel must be and continue, while in port, seaworthy in a degree commensurate with her then risk. Whether the Massachusetts rule or Mr. Phillips' rule be held the true one as to the attachment of risk upon a cargo which has been loaded, unloaded for repairs, and reshipped, it would probably not be doubted that a ship must be in such a seaworthy condition as to receive the cargo without injury thereto.[195] But such a case may be distinguished from those on which the Massachusetts doctrine is based, for a ship may be fitted to receive the cargo without injury while lying in port,

[191] Taylor v. Lowell, 3 Mass. 331.

[192] 1 Phillips on Insurance, 3d ed., 394, 395, secs. 721-23.

[193] Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270.

[194] Garrigues v. Coxe, 1 Binn. (Pa.) 592; 2 Am. Dec. 493.

[195] Stanton v. Richardson, L. R. C. P. 421; 9 C. P. 390. "A ship which is seaworthy for the purpose of an insurance upon the ship may nevertheless, by reason of being unfitted to receive the cargo, be unseaworthy for the purpose of insurance upon the cargo": Deering's Annot. Civ. Code Cal., sec. 2687.

and the cargo may be unloaded, the ship reported to be seaworthy for the voyage, and the cargo reshipped without injury or damage thereto; if the ship is in a suitable condition to carry the cargo put on board, or intended to be put on board, she is seaworthy.[196]

§ **2181. Whether Original Unseaworthiness may be Cured before Loss.**—A question has arisen whether original unseaworthiness may be cured before loss, so that the underwriter will be liable for the loss. Mr. Phillips, referring to seaworthiness, says: "This warranty is not violated so as to defeat the insurance by merely incidental, temporary deficiency at the commencement of the risk, in fitness for the voyage, that may be easily remedied, and soon is so in fact." [197] This writer, however, declares in another section that if the vessel is unseaworthy, "owing to some material deficiency," at the time referred to by the warranty, the underwriter is discharged.[198] We doubt the legality or practicability of a rule which attempts in policies "from" to distinguish between a "material deficiency" and an "incidental temporary deficiency," in connection with the warranty of seaworthiness at the commencement of the risk, in view of all that term implies. The vessel is or is not seaworthy for the voyage at the time to which the warranty relates. If the "incidental deficiency" is such a sufficient factor of seaworthiness that, if it were not remedied before loss, the warranty would be broken, it is just as much material as anyother factor of seaworthiness, and to admit an exception in such a case would open the door

[196] Schultz v. Pacific Ins. Co., 14 Fla. 73.

[197] 1 Phillips on Insurance, 3d ed., 397, sec. 726; citing Taylor v. Lowell, 3 Mass. 331; Merchants' Ins. Co. v. Clapp. 11 Pick. (Mass.) 56; Stanwood v. Rich, Sup. Ct. Mass. Suff., Nov. 1817; Debtors v. Ocean Ins. Co., 16 Pick. (Mass.) 303; Chase v. Eagle Ins. Co., 5 Pick. (Mass.) 51; United States v. Hunt, 2 Story (C. C.) 121; McMillan v. Union Ins. Co., Rice (S. C.), 249; Weir v. Aberdeen, 2 Barn. & Ald. 320. He says Mr. Justice Story intimates a doubt of this last case in McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184. Mr. Parsons reviews these cases, and concludes that they do not support Mr. Phillips' rule (1 Parsons on Marine Insurance, ed. 1868, 378, 379), and a careful examination of the same cases warrants that conclusion.

[198] 1 Phillips on Insurance, 3d ed., 381, sec. 696.

to numerous encroachments upon the rule, and leave much ground for fraud as well. If the exception be admitted that an "incidental, temporary deficiency at the commencement of the risk" can be cured before loss, then the same reason exists for holding the insurers liable in case want of seaworthiness originally existing is cured before loss, thereby leaving the question merely one whether the vessel was unseaworthy at the time of loss, instead of at the time of sailing. The rule stated by Mr. Phillips differs from the case of a risk attaching in part under a policy at and from, and also differs from the case where a vessel originally seaworthy becomes unseaworthy after the commencement of the risk, and rests upon different principles. To hold that the vessel may remedy before loss an unseaworthy condition existing at the commencement of the risk overthrows the rule that seaworthiness when the vessel sails is a condition precedent, and it is held in a case in point that where the vessel's boiler was defective at the time she sailed, so as to make her unseaworthy, that the fact that the defect was remedied before loss could not aid assured.[199] In a Louisiana case, however, the vessel sailed from port short of water, and stopped to obtain it, and was subsequently lost by a peril wholly disconnected with the original unseaworthiness, and the insurers were held liable.[200]

§ 2182. Policy at and from Vessel Sailing Unseaworthy—May Defect be Remedied before Loss?—It is an important question whether, under a policy at and from, the risk having attached in port, the sailing of a vessel in a state of unseaworthiness imputable to the assured discharges the insur-

[199] Quebec M. Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 234.

[200] Lapene v. Sun Mut. Ins. Co., 8 La. Ann. 1; 58 Am. Dec. 668. Regarding risks immaterial to peril from which injury is received, see American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 532. See 3 Kent's Commentaries, 5th ed., 289. Two cases are cited by the court: In the Louisiana case, in the first, it was held that the warranty is confined to the commencement of the risk, and if the vessel is then seaworthy the insurer is not bound, although he is liable for unseaworthiness subsequently arising. In the second case (American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287) the risk under a time policy had at-

ers, or whether it may be remedied before loss. The main question is, Is the risk divisible to the extent that, although the vessel must be seaworthy for port to a degree commensurate with her then risk, must she also be absolutely seaworthy for her voyage when she sails? Or may the doctrine of temporary suspension and removal of the risk, the policy having already attached in port, be applied, holding the insurers liable for a loss occurring after the unseaworthiness existing at the time of sailing has been remedied? It is held in England that, under a policy at and from, the fact that the vessel sails in an unseaworthy condition for the voyage, she having been seaworthy for port, does not ab initio avoid the policy so as to entitle assured to a return of the premium.[201] In another English case under a policy at and from the actual decision was that the underwriter had clearly waived an unseaworthiness which existed when the vessel first sailed, since they had consented in writing that the defect might be remedied, and that she might proceed a second time on her voyage, and the insurers were, therefore, held liable, the loss happening through another and entirely different cause.[202] It appears that the claim was made in this last case that the vessel having once sailed in an unseaworthy condition for the voyage this fact wholly put an end to the underwriter's liability on the policy, and Lord Tenterden is reported to have declared in answer to this claim that if a vessel, at the commencement of her voyage, is, by mistake or accident, unseaworthy, by reason of some defect which is immediately discovered and remedied before loss, the underwriters are nevertheless liable, since there would be many cases "where it would turn out that the assured could have no claim upon the underwriters, because something was wanting or something excessive at the instant of the ship's departure, although the want had been

tached, and the vessel left an intermediate port without replacing a small anchor which had been lost, but which the master had exercised due diligence to provide.

[201] Annan v. Woodman, 3 Taunt. 299. See Christie v. Secretan, 8 Term Rep. 198, per Lawrence, J.

[202] Weir v. Aberdeen, 2 Barn. & Ald. 320; Quebec M. Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 244, per Lord Penzance.

supplied or the excess removed before the loss happened." [203] Although the actual decision was based upon a waiver, yet in view of the fact that the above statement was made in direct answer to a claim by the underwriters, it may not unreasonably be construed as intended to apply in those cases of the character mentioned where the policy is at and from, the risk having attached and the defect remedied before loss, the loss being wholly disconnected with the unseaworthiness. We do not say, however, that this is the law, but only that such conclusion may be fairly deduced from the case; nevertheless, outside of this decision, the rule in England seems to be that if a vessel under a policy at and from sails in an unseaworthy condition for the voyage, the underwriter is discharged, though the policy has attached in or "at" port.[204] In a Massachusetts case, in an action to recover the premium, the ship, under a policy "at and from," sailed in an unseaworthy condition, but returned to port, discharged her cargo, was repaired, and cargo reshipped, when she again sailed, and the policy was held to have attached "at" port, and the insurer's liability to have continued on return to port, and subsequently on her voyage homeward, and that no return of premium could be had;[205] and to substantially the same effect in another case in the same state, under a policy on cargo and freight at and from.[206] The principle underlying the English cases seems, with perhaps the exception of the case from which Lord Ten-

[203] Weir v. Aberdeen, 2 Barn. & Ald. 320, per Lord Tenterden.

[204] Knill v. Hooper, 2 Hurl. & N. 277; Wedderburn v. Bell, 1 Camp. 1; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 675, *672; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 665, where it is said: "Of course, if she ultimately sails unseaworthy for the voyage, this, according to the rule already laid down, wholly discharges the underwriters from all liability for loss on the voyage, although the policy may have attached on her while 'at' the port, owing to her having been there seaworthy for her other risk": Citing Parker v. Potts, 3 Dow, 27; per Parke arguendo in Watson v. Clark, 1 Dow, 336. Examine 1 Marshall on Insurance, ed. 1810, 208, reporting Gilbert v. Redshaw.

[205] Taylor v. Lowell, 3 Mass. 331. See Christie v. Secretan, 8 Term Rep. 198, per Lawrence, J.

[206] Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56. But see Deshon v. Merchants' Ins. Co., 11 Met. (Mass.) 208.

terden's remarks above noted are taken, that there are really two warranties as to seaworthiness one of which attaches while the ship is in port, and is commensurate to her then risk, and the other a condition of seaworthiness for her voyage, which does not attach till she sails.[207] And it is held in this country that where the vessel is seaworthy for port, the assured also impliedly warrants that she shall be seaworthy when she sails.[208] But Lord Tenterden's opinion and the cases in this country above noted suggest the point whether, in policies at and from, curing defects of seaworthiness not latent is limited to the time between the attachment of the risk "at" port and the sailing of the vessel, or whether defects of the character suggested by Lord Tenterden may be cured before loss, so as to render the insurer liable for loss totally disconnected with the unseaworthiness, or must the vessel under a policy "at and from" be absolutely seaworthy when she sails. The two Massachusetts cases seem to indicate clearly that the risk, having once attached, is merely suspended, and revives on the vessel again becoming seaworthy; and this conclusion would be aided by the construction of the warranty given by the court in another case in that state, where it is said that it would be consistent to hold that after the policy has once attached, the underwriter should be responsible for losses which could not possibly be "occasioned by peril increased or affected by the breach of such implied warranty," but should be exempted from all loss or damage proceeding from the cause warranted against.[209] Mr. Phillips is of the opinion that a temporary unseaworthiness imputable to the assured may be remedied before loss where the policy has attached in port and the vessel sails in an unseaworthy condition, and asserts that the doctrine "is supported by considerations of equity and commercial expediency, and a predominant principle in jurisprudence that unnecessary forfeitures are to be avoided."[210] And

[207] Forbes v. Wilson, per Lord Kenyon, reported in 1 Marshall on Insurance, ed. 1810, *155; Park on Insurance, 299; Smith v. Surridge, 4 Esp. 25; Annan v. Woodman, 3 Taunt. 209, per Lawrence, J.

[208] Hoxsie v. Pacific Mut. Ins. Co., 7 Allen (Mass.), 211.

[209] Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 234, per Shaw, C. J.

[210] 1 Phillips on Insurance, 3d ed., 406, 407, sec. 734.

while the decisions afford no absolutely certain ground for the deduction of such a rule, yet we are inclined to the belief that there is much in the language of the courts, the decisions, and analogous cases to warrant such a conclusion.[211] And even in an English case it is held that under a policy "at and from" a defect in the vessel's seaworthiness for the voyage, she being seaworthy for port, may be remedied before the vessel sails.[212]

§ **2183. Vessel becoming Unseaworthy after Commencement of Risk and Defect Cured before Loss.**—If the risk has commenced, the vessel having sailed, being originally seaworthy, but she becomes unseaworthy during the voyage, and the defect is cured before loss, the warranty having been originally complied with, and the insurer's liability having once attached, it will exist at the time of loss, for the risk is in effect merely suspended, and revives when the seaworthiness again exists.[213]

[211] See 3 Kent's Commentaries, 5th ed., 289; Prescott v. Union Ins. Co., 1 Whart. (Pa.) 406; Cruder v. Philadelphia Ins. Co., 2 Wash. (C. C.) 263, 339, per Washington, J.; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184, per Story, J.; Garrigues v. Cox, 1 Binn. (Pa.) 127; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 127.

[212] Oliverson v. Loughman, cited in 2 Barn. & Adol. 322.

[213] Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 305. See secs. 2176, 2177, herein, as to "Repairs and Continuing Warranty."

TITLE IX.

CONDITIONS VOIDING THE POLICY.

(2171)

TITLE IX.

CONDITIONS VOIDING THE POLICY.

CHAPTER XLIX.

CONDITIONS VOIDING THE POLICY.

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§ 2190. Conditions in Policy—Generally.—The parties may insert in the policy such conditions as they choose, and will be bound thereby, provided the conditions are not contrary to law or public policy.[1] The law of legal relation between insurers and assured is the policy of insurance with its clauses, conditions, and stipulations, by which the mutual rights and liabilities of the parties are to be understood and measured,[2] and the assured cannot urge, in an action to

[1] Wood v. Hartford F. Ins. Co., 13 Conn. 533; Beadle v. Chenango Mut. Ins. Co., 3 Hill (N. Y.), 161.

[2] West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573.

recover for a loss, the fact that the conditions which are embodied in the policy, and upon which the insurers assumed the risk, were not specially pointed out to him.[3] But conditions in the policy should be set forth in clear and unambiguous language.[4] Concerning the effect of a condition, it may be stated that although a policy is conditioned to be void in case of a breach of any of the conditions, it is not absolutely void as a result of such a breach, but only voidable at the option of the insurers.[5] We shall only treat in this chapter of those conditions which pertain to the contract of insurance during the existence of the risk, and not of those which relate to the attachment of the risk, or to matters subsequent to the loss. Those conditions which go to the life of the policy after the risk has commenced and prior to the loss need, as a general rule, be only substantially performed. A strict and literal compliance by the insured is not necessary.[6] When an insurance company attempts to defeat a recovery upon a policy upon a condition for its own benefit, and which deprives the assured, no matter how honest his claim, of the indemnity for which he paid, the company must be held to entire good faith, and the breach of condition must be promptly taken advantage of. Nothing else must be alleged as a reason for nonpayment, and the insured must not be led astray by proposing settlement on grounds other than the alleged breach of condition.[7]

§ 2191. Alterations and Repairs—Generally.—If a policy contains no prohibition against any alteration in the insured premises, an alteration which does not increase the

[3] Reeve v. Phœnix Ins. Co., 23 La. Ann. 219.

[4] Anderson v. Fitzgerald, 4 H. L. Cas. 484.

[5] Turner v. Meridian Ins. Co., 16 Fed. Rep. 454; Shearman v. Niagara F. Ins. Co., 46 N. Y. 526; 7 Am. Rep. 380.

[6] Cady v. Imperial F. Ins. Co., 4 Cliff. (C. C.) 203; Insurance Co. of North America v. McDowell, 50 Ill. 120; 99 Am. Dec. 497; Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96; Indiana M. F. Ins. Co. v. Conner, 5 Ind. 170; Houghton Mfg. M. F. Co., 8 Met. 114; Bankhead v. Des Moines Ins. Co., 70 Iowa, 387; Home Ins. Co. v. Cohen, 20 Gratt. (Va.) 312; Shaw v. Roberts, 5 Ad. & E. 175; 1 Nev. & P. 279. See c. xlvi, herein, as to warranties.

[7] Bonnert v. Pennsylvania Ins. Co., 129 Pa. St. 558; 15 Am. St. Rep. 739.

risk will not avoid the policy.[8] In the absence of any stipulation or restriction as to alterations or repairs in the insured premises, the insured may make any alteration, change, or repairs which do not increase the risk. The insurer cannot in such cases set up, in defense to an action on the policy, the fact that there has been some trivial or immaterial alteration in the premises. Nor will the fact that the premises insured have undergone a general repairing be any defense on the part of the insurers where such repairs were necessary to render the premises tenantable. The insured in such cases is entitled to the ordinary and customary use of the insured property, and to the exercise of the ordinary acts of ownership over it, the only obligation upon him being that the risk shall not be substantially increased. If the risk has been increased, then the insurer may avoid the policy, though there is no condition to that effect, since the insured, when the policy is issued, impliedly guarantees that the risk shall not be increased.[9] The question applicable in all these cases is whether there has been an increase of risk which could not have been in the contemplation of the insurers when the insurance was effected. If there has been, then the policy is void, but if not, it will continue of full force and effect. This is a question for the jury in every instance.[10] In most policies there

[8] Stetson v. Massachusetts F. Ins. Co., 4 Mass. 330; 3 Am. Dec. 217.

[9] See secs. 2207, 2239.

[10] Wood v. Hartford F. Ins. Co., 13 Conn. 533; Latomus v. Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 404; Dorn v. Germania Ins. Co., 8 Chic. Leg. News, 156; Meyer v. Queen City Ins. Co. (La.), 6 S. Rep. 899; Washington Ins. Co. v. Davidson, 30 Md. 92; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535; Jolly v. Baltimore Ins. Co., 1 Har. & J. (Md.) 295; 18 Am. Dec. 288; Robinson v. Mercer Co. M. F. Ins. Co., 3 Dutch. (N. J.) 134; Rann v. Home Ins. Co., 59 N. Y. 387; James v. Lycoming F. Ins. Co., 4 Cliff. (C. C. Mass.) 272. In an exhaustive opinion in this case Clifford, J., said: "Whether regarded as a condition subsequent or a mere promissory warranty, the condition in question, it is clear, is not one where a literal compliance with its terms is required. Such a construction would be absurd, as it would render the policy void if the insured employed a mechanic to take out a broken slate or replace a broken pane of glass or stop a leak in a gas fixture or in a cistern. . . . . Such conditions prohibiting repairs which increase the risk it is held by some courts are operative only when the increased risk is in existence, and that the policy becomes

are conditions in regard to alterations, and these stipulations may greatly restrict and limit the rights, which the insured would otherwise have, to make alterations or repairs. The exact language of such conditions is important, for it is from them that the rights of the insured are ascertained.[11] The condition in the standard form of policy in New York is, "If the hazard be increased by any means within the control or knowledge of the insured."[12] Though the policy provides that the company will not be liable "if the risk be increased by any means within the control of the insured," yet, under a permission to make alterations in the insured property, the insured may make such alterations as he desires, provided the risk is not increased for a longer period of time or to a greater degree than is necessary to make such alterations.[13] A condition in a policy of insurance against any change in the situation and circumstances of property affecting the risk is not intended to prevent the making of necessary repairs, and the use of such means for the purpose as are reasonably necessary. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in better condition by making repairs upon it.[14] Where a policy was issued upon a "mill building and additions, including flumes . . . . and automatic sprinkler equipment complete," and permission was given to "make alterations, additions, and repairs to building and machinery," it was held that the insured might remove the sprinkler equipment for the purpose of putting in a more complete one, and that such removal would not avoid the policy.[15]

effectual as soon as the increased risk terminates": Thompson v. Hopper, El. B. & E. 1038; Stokes v. Cox, 1 Hurl. & N. 543; Buxendale v. Harvey, 4 Hurl. & N. 445.

[11] See Imperial F. Ins. Co. v. Coos Co., 151 U. S. 452; 14 Sup. Ct. Rep. 459.

[12] 3 N. Y. Rev. Stats, 8th ed., 1663; Laws 1886, c. 48.

[13] Firemen's Ins. Co. v. Appleton Paper & Pulp Co. (Ill. S. C. 1896), 43 N. E. Rep. 713.

[14] First Congregational Church v. Holyoke M. F. Ins. Co., 158 Mass. 475; 35 Am. St. Rep. 508.

[15] Firemen's Ins. Co. v. Appleton Paper & Pulp Co. (Ill. S. C. 1896), 43 N. E. Rep. 713.

Placing and operating an engine fifty feet away from an insured building is not an alteration of the insured premises, nor is it a use for carrying on trade or business which increases the risk unless expressly so declared by the contract.[16]

§ 2192. Permission to Make Alterations or Repairs. Permission in an insurance policy to make necessary alterations or repairs will not be considered as giving permission to make such changes as will materially increase the risk. So where the policy authorized the insured to make "necessary alterations and repairs," it was held that this did not authorize him to construct an addition to the building twelve feet in width, and two hundred feet in length.[17] If "the insured has permission to make alterations and repairs incidental to the business," he cannot make such repairs or alterations as will materially increase the liability of the property to destruction by fire.[18] And where a policy of insurance gave permission to the insured "to make additions, alterations, and repairs," it was held that a new warehouse erected forty feet away from the main building was neither an addition, an alteration, or repairs, although connected with the main building by a bridge and an underground passage used for pipes.[19]

§ 2193. Whether Loss was Occasioned by the Alterations cannot be Inquired into—Materiality of Alteration. If, in the absence of any stipulation as to alteration or increase of risk, it be shown that the risk has been materially increased by any alteration, the fact as to whether the loss was caused thereby cannot be inquired into. The insured cannot show it in an action to recover for a loss, and the insurer is not obliged to show that the alteration caused the loss. And this same rule prevails under a condition forbidding any alterations or repairs which increase the risk. So where, in an ac-

[16] Schaeffer v. Farmers' Mut. F. Ins. Co., 80 Md. 563; 45 Am. St. Rep. 361.

[17] Frost's Detroit Lumber Works v. Millers' M. Ins. Co., 37 Minn. 300; 34 N. W. Rep. 35.

[18] Crane v. City Ins. Co., 3 Fed. Rep. 558.

[19] Peoria Sugar Refinery Co. v. People's F. Ins. Co., 24 Fed. Rep. 773.

tion upon a policy of insurance issued by a company incorporated under an act which provides that if any alteration shall be made in any building by the proprietor thereof, after insurance has been made thereon by the company, whereby it may be exposed to greater risk from fire, the insurance shall be void, unless an additional premium and deposit after such alteration be settled and paid to the company, but no alterations or repairs not increasing the risk shall affect the insurance, it is held that an instruction was correct, that in case of a material alteration, it was not necessary, in order to avoid the policy, for the company to show that the loss had been occasioned by the alteration.[20]

§ **2194. Materiality of Alteration.** — If the policy specifies certain alterations as prohibited, any such alterations, if made by the insured, will avoid the policy, and the question will not then arise as to whether such alterations are material to the risk. If, however, such alterations as increase the risk are prohibited, then the question arises as to whether the alterations made do in fact increase the risk. In determining this question, the factor whether the rate of premium charged for the insurance is that which would have been charged in the altered condition of the building is important, and it has been held that if the building as altered would not have called for a higher rate of premium than before such alteration, then there has been no increase of the risk.[21] In a case involving this point it was held that an instruction to the jury that the alteration must have been such that a higher rate of premium would have been demanded to insure the building in its altered state than before, otherwise the alteration was not material, was correct.[22] The fact, however, that the insurers would have charged a higher premium is not of itself conclusive as to whether the risk has been increased. It is a question for the jury to decide, under all the facts of the case,

[20] Merriam v. Middlesex etc. Ins. Co., 21 Pick. (Mass.) 162; 32 Am. Dec. 252.

[21] Schenck v. Mercer Co. Mut. F. Ins. Co., 24 N. J. L. (4 Zab.) 447.

[22] Merriam v. Middlesex etc. Ins. Co., 21 Pick. (Mass.) 162; 32 Am. Dec. 252.

whether the risk has actully been increased, and the fact that the insurer regarded it as a greater risk is not conclusive upon the jury.[23]

§ **2195. Alteration by Act of Proprietors.**—The alteration of insured premises by "act of proprietors" so as to avoid the insurance, within the terms of the charter of the insurance company, is an alteration by the owner himself, or authorized by him or adopted as his before a loss accrues, and not an alteration by the tenant without authority, and whether he has authorized and adopted the act is a question for the jury.[24]

§ **2196. Alteration Conditioned to be at Risk of Insured.**—Under an insurance policy providing that alterations or repairs made in and about the insured premises must be at the risk of the party insured, such repairs or alterations do not per se avoid the contract, but only place upon the insured party the hazard of their increasing the liability of the insured.[25]

§ **2197. Repairs upon the Insured Premises—Builder's Risk.**—We have already stated that such ordinary repairs as are necessary to render the premises tenantable and to keep the property insured in such condition as is necessary for the proper enjoyment and use thereby will not avoid the policy. The insured is entitled to make ordinary and necessary repairs about the premises.[26] Thus, after a policy of insurance was taken out on a mill, the boiler being cracked and in a dangerous condition, it became necessary to put in another with some additions, and these repairs did not increase the risk, and extended no farther than was reasonably necessary, and were completed several months before the destruc-

[23] Williams v. People's F. Ins. Co., 57 N. Y. 274.

[24] Padleford v. Providence M. F. & L. Ins. Co., 3 R. I. 102; 67 Am. Dec. 496.

[25] Girard F. Ins. Co. v. Stephenson, 37 Pa. St. 293; 78 Am. Dec. 423.

[26] Dorn v. Germania Ins. Co., 8 Chic. Leg. News, 156; Lyman v. State Ins. Co., 14 Allen (Mass.), 329; Grant v. Howard Ins. Co., 5 Hill (N. Y.), 10.

tion of the mill. It was held in an action on the policy that the above facts did not render it void under the condition termed the "builders' risk."[27] In another case the application stated that there was a force pump," designed expressly for protection against fire, at all times in good condition for use." The insured, for the purpose of putting in a new bulkhead, the old one being badly decayed, interrupted the supply of water for several days, thus disabling the pump, and it was held that these acts did not avoid the policy if the repairs were made without unnecessary delay;[28] and though in making the repairs prohibited articles are taken upon the premises, this will not avoid the policy where such articles are necessary and incidental to making the repairs.[29] Although the insured may make necessary and ordinary repairs about the insured premises, yet if the repairs are of an extensive nature, and amount to a material alteration, and such as increase the risk, the insured cannot recover on the policy for a loss occurring subsequent to the alteration.[30] Again, a policy of insurance against fire on an icehouse contains a condition entitled "builder's risk," and that "the working of carpenters, roofers, etc., in building, altering, or repairing the premises named in the policy, without permission indorsed in writing on the policy, should vitiate it." The assured, in an action on the policy, testified that the "icehouse was nearly as good as new, for the reason that he always kept a crew of men and a carpenter or two about the building the year round, and was constantly making repairs and keeping the building in thorough condition." It was held that, under the facts, the policy was not vitiated.[31]

§ 2198. Specially Prohibited Articles under Policy on Stock of Goods, etc.—Generally.—The policy generally

[27] James v. Lycoming Ins. Co., 4 Cliff. (C. C.) 272.

[28] Townsend v. Northwestern Ins. Co., 18 N. Y. 168.

[29] Au Sable Lumber Co. v. Detroit Mfg. Mut. F. Ins. Co., 89 Mich. 407; 50 N. W. Rep. 870; 21 Ins. L. J. 311.

[30] Howell v. Baltimore Equitable Soc., 16 Md. 377; Allen v. Massasoit Ins. Co., 99 Mass. 160; Kern v. South St. Louis Ins. Co., 40 Mo. 19; Mack v. Rochester German Ins. Co., 106 N. Y. 560.

[31] Franklin F. Ins. Co. v. Chicago Ice Co., 36 Md. 102; 11 Am. Rep. 469.

prohibits the keeping or use of certain articles upon the insured premises. Stipulations of this character must be construed in reference to the subject matter of the policy, having in view the general rule that if the written and printed parts of a policy are inconsistent, that which is written will prevail over the printed. There are many instances in which a policy of insurance is issued upon a stock of goods, or upon materials used in a manufacturing establishment as a part of the stock usually and ordinarily required in such business, or it may happen that in the process of manufacture certain articles are kept or used which are prohibited in the printed stipulations of the policy. In such cases, to hold otherwise than that the written should prevail over the printed matter, would be to defeat the purposes of the policy and the clear intent of the parties when making the contract; nor should the printed matter be extended by implication to defeat the written description. If the insurer issues a policy upon a stock of goods such as is "usually kept," or a similar phrase is used, the insured should, as a general rule, subject to such qualifications as are hereafter noted, be allowed to recover where he can show that such articles were usually kept in that business. Substantially the same rule should also prevail, in the case of an insurance upon materials, or a building used for the purposes of manufacture, as to articles usual and necessary to carry on the business. To declare a forfeiture in such cases, based upon the printed description as opposed to the written description, would be to give the insurer the benefit of terms of his own choosing, which will perhaps operate to deceive the insured into the belief that his property is protected. And it is a cardinal rule that courts will construe conditions strictly against the insurer so as to prevent a forfeiture. The wording of the policy should, therefore, be carefully considered in all cases. These principles are clearly sustained by the cases noted under the following sections.

§ 2199. "Stock in Trade"—"Goods usually Kept."—The insurer is presumed to contract with reference to the business known to be conducted upon the premises, and if in the ordinary use of the premises, building, or goods upon which

the insurance is effected certain articles are used which are prohibited in the printed portion of the policy, this will not avoid the policy.[32] So an insurance on a dry goods store which prohibits "the use of the premises for carrying on or exercising any business which is hazardous or extra-hazardous, or for the purpose of keeping or storing goods of that character," is not void because bales of cotton are kept in such store as a part of the dry goods stock in trade, although such articles are designated in the policy as hazardous.[33] And where the policy describes the stock to be "such as is usually kept in a country store," but in the printed condition many of the articles which are usually kept in such a store are prohibited as hazardous, the written description of the property will overcome the printed conditions therein.[34] If the clause "usually kept in a country store," or one of similar import, is followed by the words "except as hereinafter provided," and in the subsequent printed part of the policy certain articles are prohibited, the policy will be avoided by the keeping of any of such articles.[35] If the clause "usually kept," etc., is followed by a clause permitting the keeping of a specified quantity or amount of the prohibited articles, the insured will not be permitted to show that a greater amount is usually kept in such stores.[36] So where the insurance is upon the "stock in trade" of a furniture dealer, paints, varnishes, and oils used in the course of the business are covered.[37] Where, however, the policy is upon "stock in trade, consisting of not hazardous merchandise," and the policy classifies the hazards as not hazardous, hazardous, extra-hazardous, and specially hazardous, if goods are kept which are within the classes specified as being of

[32] Grant v. Lexington F. Ins. Co., 5 Ind. 23.

[33] Moore v. Protection Ins. Co., 29 Me. 97; 48 Am. Dec. 514.

[34] Franklin F. Ins. Co. v. Updegraff, 43 Pa. St. 350; Whitmarsh v. Conway F. Ins. Co., 16 Gray (Mass.), 359; Phœnix Ins. Co. v. Taylor, 5 Minn. 492; Pindar v. Kings Co. Mut. Ins. Co., 36 N. Y. 548; Carrigan v. Insurance Co., 53 Vt. 418. See contra, Western Assur. Co. v. Rector, 85 Ky. 294; Beers v. Forest City M. F. Ins. Co., 39 Ohio St. 109. Examine Birmingham F. Ins. Co. v. Kroeger, 83 Pa. St. 64.

[35] Lancaster F. Ins. Co. v. Leuheim, 89 Pa. St. 497.

[36] Pittsburgh Ins. Co. v. Frazier, 107 Pa. St. 521.

[37] Haley v. Dorchester F. Ins. Co., 12 Gray (Mass.), 546.

greater risk, the policy is avoided.[38] A policy of insurance upon the materials used in a business, or the process of manufacture, will permit the use of all such materials as are ordinarily used in that business, though the printed part of the policy may prohibit keeping some of those materials.[39] If, however, the policy covers finished articles which are not in the process of manufacture, articles used in the manufacture of the finished product cannot be kept. So where a policy was issued upon a stock of "cabinet wares," it was held that the keeping of paint and varnish, which was used in the manufacture of the cabinet wares, being prohibited in the printed conditions, the policy was avoided.[40]

§ **2200. Storing of Prohibited Articles.**—Another of the ordinary conditions of an insurance policy is that prohibiting the storing of certain hazardous articles; this provision has been construed as covering only those cases where the storing and safekeeping of the prohibited articles is the sole object of the deposit, or to the storing in a mercantile sense; that is, a keeping for safe custody. It does not refer to a keeping as incidental to the use.[41] The keeping of hazardous articles for the purpose of retail is not a storing within the meaning of the condition.[42] In such cases, though the goods are kept, the purpose of the keeping is not the storing of them, but that of sale; the keeping being in all such instances incidental to the use.[43] Thus, the keeping by a grocer of oils and liquors for this purpose will not avoid the policy under such a condi-

[38] Richards v. Protection Ins. Co., 30 Me. 273.

[39] Hall v. Insurance Co. of North America, 58 N. Y. 292; Citizens' Ins. Co. v. McLaughlin, 53 Pa. St. 485; 6 Am. L. Reg., N. S., 374. See Bryant v. Poughkeepsie M. Ins. Co., 21 Barb. (N. Y.) 154; 17 N. Y. 200.

[40] Appleby v. Astor Ins. Co., 54 N. Y. 253.

[41] Williams v. Fireman's Fund Ins. Co., 54 N. Y. 569; New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

[42] Renshaw v. Missouri State M. F. & M. Ins. Co. (Mo.), 43 Alb. L. J. 400; 20 Ins. L. J. 385; 15 S. W. Rep. 945. But see contra, Whitmarsh v. Charter Oak F. Ins. Co., 2 Allen (Mass.), 581; Macomber v. Howard F. Ins. Co., 7 Gray (Mass.), 257.

[43] Moore v. Protection Ins. Co., 29 Me. 97; Phœnix Ins. Co. v. Taylor, 5 Minn. 492.

tion.[44] Nor will the keeping of spirituous liquors in a house for the puropse of retailing them to the boarders avoid the insurance.[45] If an insurance is upon a building in the process of erection, articles necessary to be used in the construction thereof may be kept, though the policy prohibits storing of such articles. Such keeping for use is not a storing within the meaning of the condition.[46] Nor is the temporary keeping of tar for the purpose of repairing the building a storing.[47]

§ 2201. Keeping of Prohibited Articles—Hazardous and Extra-hazardous.—The insurer may prohibit the keeping of certain articles by express terms in the policy. Such articles are generally specified in the printed portion of the policy. When there is nothing in the written portion inconsistent with the printed part, as a general rule no recovery can be had for a loss occurring while such articles are kept. These articles, and also the prohibited uses of the premises, may be classified with reference to their bearing upon the risk, for some articles kept or trades pursued upon the premises may be of a more hazardous nature than others. The terms "not hazardous," "hazardous," "extra-hazardous," and "specially hazardous" are used by the different insurers to classify the different risks. Each of these terms has a separate and distinct technical meaning which is well understood among insurers.[48] The condition prohibiting hazardous articles has been held to refer to those articles which create a greater risk of fire, and

[44] New York etc. Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623; Buchanan v. Exchange Ins. Co., 61 N. Y. 426.

[45] Rafferty v New Brunswick Ins. Co., 18 N. J. L. 480.

[46] O'Neil v. Buffalo F. Ins. Co., 3 Comst. (N. Y.) 122.

[47] Dobson v. Lothby, 1 Moody & M. 90.

[47] Pindar v. Continental Ins. Co., 38 N. Y. 364; 97 Am. Dec. 795. In this case Woodruff, J., said: "With these specifications of risks, 'not hazardous,' 'hazardous,' 'extra-hazardous,' and 'specially hazardous,' the parties agree to an insurance. The policy declares what was insured in explicit terms as 'goods hazardous' and 'not hazardous' and excludes all others. It follows that the condition by which the policy was declared void if any goods 'extra-hazardous' are kept, the contract is specific—the defendant had a right to make it, and the keeping of turpentine, it being extra-hazardous,' was fatal and forbade any recovery."

not to those which are more liable to injury in case of fire.[49] A policy upon goods "hazardous" and "not hazardous," will not cover merchandise included in the terms "extra-hazardous" and "specially hazardous." [50] The conditions of keeping and the enumeration of articles mentioned as hazardous in a policy of insurance form part of it, and, if prohibited by it, it is not necessary for the insurer to show that the keeping thereof caused the loss or increased the risk.[51] A clause prohibiting the keeping of certain articles cannot be extended to include buildings not covered by the policy.[52] If the policy prohibits the keeping of certain articles which are denominated as hazardous, it is held that the casual deposit of any of these articles in the building covered will not be a violation of the condition;[53] nor will the keeping of articles incidental to the use of the insured premises.[54] If the policy specifies articles which it prohibits as being of a hazardous nature, articles which are not enumerated in such specification will not avoid the policy, except the keeping of such articles materially increases the risk.[55]

§ 2202. Specially Prohibited Articles—Benzine—Burning Fluid—Camphene—Fireworks—Gasoline.—The temporary taking of benzine upon the premises for the purpose of cleaning the machinery is not a violation of a condition forbidding the insured to "keep or have . . . . benzine" upon the premises,[56] and if the keeping of a particular article, such as benzine, is necessary in the insurer's business, the fact that the printed portion of the policy excludes the keeping

[49] Rathbone v. City F. Ins. Co., 31 Conn. 193.

[50] Pindar v. Continental Ins. Co., 38 N. Y. 364; 97 Am. Dec. 795; Richards v. Protection Ins. Co., 30 Me. 273.

[51] Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; 81 Am. Dec. 521.

[52] Sperry v. North American Ins. Co., 22 Fed. Rep. 516.

[53] Hynds v. Schenectady M. Ins. Co., 11 N. Y. 554. See Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; 81 Am. Dec. 521.

[54] New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

[55] New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

[56] Mears v. Humboldt Ins. Co., 92 Pa. St. 15; 37 Am. Rep. 647; 9 Ins. L. J. 139.

thereof will not avoid the contract, where the written portion of the contract covers the property to be used in conducting that particular business.[57] Again, where a policy by a typewritten rider annexed thereto, insures "paints, oils, varnishes," and "such other articles as are usually kept in a sign painter's and carriage painter's and tinner's shop," the insured may show that benzine is one of the articles usually kept in such a business, and therefore that the policy is not avoided by its keeping, and this though the policy provides in its printed stipulations that it shall be void 'if (any usage or custom of trade or manufacture to the contrary, notwithstanding) there be kept benzine." [58] An insurance policy containing clauses which forbid the keeping by the insured upon his premises of "hazardous" articles, but which has indorsed upon it by the company permission "to keep one barrel of benzine or turpentine in tin cans," is not violated by the introduction of a barrel of benzine in a wooden barrel upon the premises for the purpose of immediately emptying the same into a tin can.[59] Where a policy provides that it shall be void in case benzine is used upon the premises, a statement by the insured in his proofs of loss that he had been informed that the fire was caused by the use of benzine by others upon the premises will not estop him from showing upon the trial that no benzine was in fact used, in the absence of any claim of surprise by defendant.[60] Whether benzine is a "burning fluid or chemical oil" is a question of fact for the jury.[61] If the memorandum of special hazards prohibits the use of burning fluid for lighting, such use will avoid the policy.[62] Burning fluid, as prohibited in a policy of insurance, does not necessarily mean any fluid which will burn.[63] Though a policy pro-

[57] Faust v. American F. Ins. Co., 91 Wis. 158.

[58] Mascott v. Granite State F. Ins. Co. (Vt. 1896); 35 Atl. Rep. 75.

[59] Maryland F. Ins. Co. v. Whiteford, 31 Md. 219; 1 Am. Rep. 45.

[60] White v. Royal Ins. Co. (N. Y. C. A. 1896), 44 N. E. Rep. 77; affirming 29 N. Y. Supp. 323.

[61] Mears v. Humboldt Ins. Co., 92 Pa. St. 15; 37 Am. Rep. 647; 9 Ins. L. J. 139.

[62] Campbell v. Charter Oak F. & M. Ins. Co., 10 Allen (Mass.), 213.

[63] Putnam v. Commonwealth Ins. Co., 4 Fed. Rep. 753.

hibits in its printed conditions the keeping of camphene, yet where a building is insured "privileged for a printing office," the insured may use camphene so far as is necessary in the business of printing.[64] A provision in a policy forbidding the use of camphene is not violated by the use of a fluid for the purpose of illumination which is not in its nature like camphene.[65] The keeping of dynamite in a building without the written consent of the insurance company will avoid a policy prohibiting the keeping of nitro-glycerine in the building.[66] Fireworks may be shown to be an ordinary part of a stock of a "fancy goods and Yankee notion store," upon which a policy of insurance has been issued, and where it is so proven, the keeping of them is not a violation of a printed condition of the policy forbidding such keeping.[67] Where the policy of insurance upon a building prohibited the keeping of fireworks upon the premises, it was held that the keeping of fireworks in a building twenty-five or fifty feet distant did not avoid the policy.[68] It has been held that an insurance upon "family groceries, wines, liquors, tobacco, and cigars" does not include fireworks.[69] A clause in a policy of fire insurance prohibiting the generating or evaporating within the building, or contiguous thereto, of any substance for burning gas, or the use of gasoline for lighting, is not infringed by the manufacture of gas from gasoline fifty feet from the building, and the use of

[64] Harper v. Albany Ins. Co., 17 N. Y. 194. In this case the court said: "By insuring the plaintiff's stock, with the privilege of a printing office and book bindery, the use of such materials, including camphene, as were necessary in that business were allowed; otherwise, the contract was a mere delusion. But the restraining clause might nevertheless have its full effect upon the use of camphene for the purposes of light and for all purposes beyond its necessary connection with the stock and business insured."

[65] Wheeler v. American Cent. Ins. Co., 6 Mo. App. 235.

[66] Sperry v. Springfield F. & M. Ins. Co., 26 Fed. Rep. 234.

[67] Barnum v. Merchants' F. Ins. Co., 97 N. Y. 188. See Steinbach v. Lafayette Ins. Co., 54 N. Y. 90; Steinbach v. Relief Ins. Co., 13 Wall. (U. S.) 183; Pliriskey v. Germania F. Ins. Co., 32 Fed. Rep. 47.

[68] Allemania F. Ins. Co. v. Pittsburgh Exposition Soc., 4 Pa. St. (L. Ed.) 718; 10 Cent. Rep. 292; 11 Atl. Rep. 592.

[69] Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366.

it for lighting the building, it not appearing that gas and gasoline are substantially the same.[70] Though gasoline and coal oil may be articles of the class known as "extra-hazardous," the keeping of them in reasonable quantities in a grocery store for the purpose of selling at retail, unless specially prohibited in the policy, will not avoid a contract of fire insurance.[71] Where a policy is conditioned to be void in case gasoline is kept upon the premises, testimony showing that the fire was not caused by gasoline is inadmissible,[72] and a condition in a fire policy against the keeping of gasoline upon the insured premises will be broken where kept by one who temporarily occupies the premises with the implied consent of the insured, such violation being deemed a violation by the assured.[73] So where the condition of the policy was that it should be void if, among other things, gasoline was kept, used, or allowed on the insured premises, and the question was whether there had been any violation of this condition on the part of the insured, and the cause of the fire was not in any way involved, and as such testimony was calculated to mislead the jury, it was properly rejected."[74] A prohibition against using the premises for a more hazardous business does not include the use of gasoline for lighting.[75]

§ **2203. Specially Prohibited Articles—Gunpowder—Hay—Kerosene—Lights—Naphtha.**—A condition against keeping gunpowder for sale or on storage upon the premises does not cover the case where gunpowder is merely kept upon the premises, but neither on storage nor for sale;[76] nor does it cover the merely placing of it upon the premises.[77] A con-

[70] Arklll v. Commerce Ins. Co., 69 N. Y. 191; 25 Am. Rep. 168. See Liverpool etc. Ins. Co. v. Gunther, 116 U. S. 113.

[71] Renshaw v. Missouri State M. F. etc. Ins. Co. (Mo.), 15 S. W. Rep. 945.

[72] Turnbull v. Home F. Ins. Co. (Md. 1896), 34 Atl. Rep. 875.

[73] German F. Ins. Co. v. Board of Commrs. (Kan. 1895), 39 Pac. Rep. 697.

[74] Per the court in Turnbull v. Home F. Ins. Co. (Md. 1896), 34 Atl. Rep. 875.

[75] Mutual F. Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407.

[76] Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684.

[77] Insurance Co. v. Hughes, 10 Lea (Tenn.), 461.

dition in a policy of insurance upon "dry goods and groceries" that it shall be void in case gunpowder is kept "upon or in the premises insured," has been held not to apply in such a case, as "premises" means real estate, and not "dry goods and groceries." So where a policy of insurance provides that the building insured is privileged to contain goods "not hazardous, hazardous, and extra-hazardous," and the proposals annexed thereto enumerate three classes of goods under the several heads, "not hazardous," "hazardous," and "extra-hazardous," adding at the close of the last class, "gunpowder is not insurable unless by special agreement," the meaning is that gunpowder belongs to the "extra-hazardous" class, and may be stored in the building without forfeiting the policy, but that it will not be covered by the insurance unless there is a special agreement to that effect.[78] Where the insurance was upon "a stock of goods and merchandise" in plaintiff's store, it was held that though the policy forbids the keeping of gunpowder, the keeping of it in small quantities for the purpose of retail did not avoid the policy.[79] Placing gunpowder in a building is not a "storing" of gunpowder therein within the meaning of an exception in the policy, where the powder is placed there with a lighted match by municipal authority, for the purpose of an explosion.[80] Where the policy does not cover "extra-hazardous" articles, the keeping of hay, which is one of the articles designated in that class, will avoid the policy.[81] If the policy forbids the keeping of "hay pressed in bales," it being claimed as hazardous, it is held that the keeping of loose, unbaled hay in large quantities is also forbidden, since it is of a more hazardous nature.[82] In the absence of proof, kerosene oil will not be held to be a "burning fluid or chemical oil," as these terms are used in an insurance policy.[83] Where a policy of fire insurance upon goods in a

[78] Duncan v. Sun F. Ins. Co., 6 Wend. (N. Y.) 488; 22 Am. Dec. 539.

[79] Leggett v. Ætna Ins. Co., 10 Rich. (S. C.) 202. But see Western Assur. Co. v. Rector, 85 Ky. 294; 3 S. W. Rep. 415. See Pittsburgh Ins. Co. v. Frazee, 107 Pa. St. 521.

[80] City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; 34 Am. Dec. 258.

[81] Francis v. Somerville Mut. Ins. Co., 25 N. J. L. 78.

[82] Dittmer v. Germania Ins. Co., 23 La. Ann. 458.

[83] Mark v. National F. Ins. Co., 24 Hun (N. Y.), 565.

store contained a clause prohibiting the use of any burning fluid or chemical oils, and a subsequent clause expressly permitting the use of kerosene oil for use of lights in dwellings, it was held that the use of kerosene oil as a light in the store rendered the policy null and void.[84] A policy of insurance which allows the keeping of kerosene on the premises to be used for lights, provided the lights are filled and trimmed by daylight, is avoided where the insured draws kerosene by lamplight for the purpose of loaning it to a neighbor, in consequence of which an explosion occurs.[85] A policy of insurance issued upon a photographer's stock, "including . . . . materials used in their business," has been held to permit the use of a portable kerosene oil lamp or stove, such as is ordinarily used in that business, though there may be a clause prohibiting the use of kerosene.[86] Where a policy provided that the insurers should not be liable for loss occasioned by the use of kerosene oil as a light in any barn or outbuilding, and the insured took a kerosene lamp to his barn to catch fowls, and while there the lamp was upset and the barn destroyed, it was held that if the fire was occasioned by the use of the kerosene rather than of any other burning fluid, the policy was avoided, the condition not being restricted to an habitual use of the oil in the barn.[87] A provision that the insurer will not be liable "for the use of kerosene" means where the loss is occasioned by such use.[88] Where a steamboat was insured against fire by a policy conditioned to be void "if gunpowder, camphene, spirit gas, naphtha, benzine or benzole, chemical, crude, or refined coal oils are kept or used on the premises without consent," it was held that the use of kerosene oil to light the boat did not forfeit the policy.[89] Where a fire insurance policy prohibited the use of camphene, spirit gas, burning fluid, or chemical oils, but permitted the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the

[84] Cerf v. Home Ins. Co., 44 Cal. 320; 13 Am. Rep. 165.
[85] Gunther v. Liverpool etc. Ins. Co., 34 Fed. Rep. 501.
[86] Hall v. Insurance Co., 58 N. Y. 292; 17 Am. Rep. 255.
[87] Matson v. Farm Buildings Ins. Co., 73 N. Y. 310; 29 Am. Rep. 149.
[88] Jones v. Howard Ins. Co., 117 N. Y. 103; 26 N. Y. St. Rep. 844.
[89] Morse v. Buffalo F. Ins. Co., 30 Wis. 534; 11 Am. Rep. 587.

lamps filled by daylight, and the insured used for lights lard oil and candles, filling the lamps at night, it was held no breach of condition.[90] The use of a naphtha torch to burn old paint from a wooden building for the purpose of repainting it, when such use continues every working day for nearly a month, violates a condition in a policy of insurance providing that it shall become void if the situation and circumstances of the risk shall be so altered as to cause an increase thereof, and this is so even though the naphtha is not on or in the premises, but is used in a liquid form a few inches outside the wall;[91] and in such case the question to be submitted to the jury is whether the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger from fire, as well as other considerations. If the use of the naphtha torch was, under the circumstances and at the time and in the manner in which it was used, an unreasonable use, the policy is avoided thereby.[92]

§ 2204. Specially Prohibited Articles—Petroleum—Saltpeter—Spirituous Liquors—Turpentine.—The keeping by the insured of small quantities of petroleum for medicinal purposes will not avoid a policy which provides that if petroleum is stored upon the premises without written consent the policy shall be void.[93] Where a fire insurance policy on a specifically described steam flour-mill and machinery prohibited keeping of petroleum on "the premises," and the insured kept a barrel of petroleum in the engine-house adjoining, but not included in the specific description of the premises, and the fire originated in the main building, it was held that the petroleum was not on "the premises," and that the insured had a right to keep petroleum on the premises for the

[90] Carlin v. Western Assur. Co., 57 Md. 515; 40 Am. Rep. 440.

[91] First Congregational Church v. Holyoke M. F. Ins. Co., 158 Mass. 475; 35 Am. St. Rep. 508.

[92] First Congregational Church v. Holyoke M. F. Ins. Co., 158 Mass. 475; 35 Am. St. Rep. 508.

[93] Williams v. Firemen's Fund Ins. Co., 54 N. H. 59; 13 Am. Rep. 620.

purpose of lubricating the insured machinery.[94] An insurance upon a wholesale grocery, with permission to keep "all articles kept for sale in such stock," is not avoided by the keeping of saltpeter, though the policy contains a printed stipulation prohibiting insured from keeping it, where it is shown to be part of stock usually kept in such business.[95] In Illinois, it has been held that an instruction in an action on an insurance policy that if the company knew the character of the business to be carried on when it issued the policy, it must be held to have taken the risks usual in that business, is erroneous, as tending to mislead, where the defense was that the insured kept saltpeter on the premises in violation of the condition of the policy, and the proof showed not only that it was of doubtful necessity for the insured to keep saltpeter on the premises to carry on his business, and unreasonable to keep a keg of it, but also that he kept it on sale.[96] In an action upon a policy of fire insurance which covered a stock of "drugs and medicines" and contained a stipulation that the policy should be avoided "if the insured shall keep gunpowder, fireworks, saltpeter," etc., it was held that the prohibition was not against keeping saltpeter as a drug, but only in such manner or quantity or for such purpose as would increase the risk, and where saltpeter was on hand as part of the stock of drugs at the time the policy issued, being an article usually kept in drug stores, it was kept as a part of the stock insured, and although specially prohibited by the terms of the policy, the contract was not thereby avoided.[97] Though a policy provides that spirituous liquors shall not be kept, yet where such keeping is incidental to the business of a grocer, it does not avoid the policy.[98] So also they may be kept for the use of the family, or for the purpose of selling to boarders.[99] Spir-

[94] Carlin v. Western Assur. Co. of Toronto, Canada, 57 Md. 515; 40 Am. Rep. 440.

[95] Stout v. Commercial Ins. Co., 11 Ins. L. J. 688; 11 Biss. (C. C.) 309.

[96] Commercial Ins. Co. v. Mehlman, 48 Ill. 313; 95 Am. Dec. 543.

[97] Collins v. Farmville Ins. & B. Co., 79 N. C. 279; 28 Am. Rep. 322.

[98] New York etc. Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

[99] Rafferty v. New Brunswick etc. Ins. Co., 18 N. J. L. 480; 38 Am. Dec. 525.

its of turpentine may be shown to be part of the stock usually kept in the business upon the stock of which the policy is issued.[100] In Pennsylvania, however, where a fire policy insured a stock of "general merchandise of all kinds usually kept in a country retail store . . . . except as hereinafter provided," and immediately following this was a printed exemption from liability for loss where "turpentine or benzine" were deposited, stored, kept, or used without written consent on the policy, and the insured kept for sale both turpentine and benzine without such consent, it was held that the policy was void, although those articles might be part of the merchandise usually kept in such stores.[101]

§ 2205. Erection of Buildings Adjacent to Insured Premises.—Unless the policy contains a stipulation against the erection of adjacent buildings, it has been held that it will not be avoided by the erection of such buildings unless some injury actually results therefrom.[102] It has been held that though the erection of adjacent buildings by the insured may increase the risk, this will not avoid the policy, unless such loss is occasioned by such increase.[103] The fact that a policy is issued upon a building which is described as having

[100] Pindar v. Kings Co. Ins. Co., 36 N. Y. 648.

[101] Lancaster F. Ins. Co. v. Lenheim, 89 Pa. St. 497; 33 Am. Rep. 778. Under the New York standard form of fire policies the condition as to prohibited articles reads as follows: "If (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or alowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard, which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial lights": 3 N. Y. Rev. Stats., 8th ed., 1663; Laws 1886, c. 488.

[102] Gates v. Madison Co. & C. Ins. Co., 5 N. Y. (1 Seld.) 469; 55 Am. Dec. 360. See Pottsville Iron Co. v. Horan, 9 Ins. L. J. 201. Examine Stetson v. Massachusetts Ins. Co., 4 Mass. 330; Lattomus v. Farmers' M. F. Ins. Co., 3 Houst. (Del.) 404.

[103] Howard v. Kentucky & L. Mut. Ins. Co., 13 B. Mon. (Ky.)282; Stebbins v. Globe Ins. Co., 2 Hall (N. Y.), 632.

no buildings adjacent thereto is no warranty upon the part of the insured that no adjacent buildings will be erected, where the policy contains no stipulation to that effect.[104] A policy which stipulates that if the risk is increased by the erection of adjacent buildings, the insurer may rescind the contract, is not made absolutely void by the erection of such buildings, and if the insurers fail to rescind the contract after having knowledge of the facts, the insured may recover for subsequent loss.[105] Where a policy provides that it shall be void if the risk is increased by the erection of any building contiguous thereto, the erection of a building twenty-five feet distant from the one insured is not contiguous, within the meaning of the policy.[106] If a policy is conditioned to be void in case the risk is increased by any alteration or change in circumstances by or with the advice, agency, or consent of the insured, the erection of a building by the insured on an adjoining lot which increases the risk will avoid the policy;[107] as it will also where the policy prohibits any increase of risk by any means within the control of the insured.[108] If the erection of adjacent buildings has decreased the general risk, it will not avoid the policy, though the external risk has been increased. Thus, where a furnace was taken out of the insured building and placed in an addition, which had been built subsequent to the issuance of the policy, it was held that as the change decreased the risk generally, the policy was not avoided.[109]

§ **2206. Erection of Adjacent Buildings to which Insured is not a Party.**—If buildings are erected upon adjoining land over which the insured has no control, this will

[104] Howard v. Kentucky & L. Mut. Ins. Co., 13 B. Mon. (Ky.) 282.

[105] Commercial Ins. Co. v. Mehlman, 48 Ill. 313.

[106] Olson v. St. Paul F. & M. Ins. Co., 35 Minn. 432; 29 N. W. Rep. 125.

[107] Allen v. Massasoit Ins. Co., 99 Mass. 160. See, also, Howard v. Kentucky & L. Ins. Co., 13 B. Mon. (Ky.) 289; Boatwright v. Ætna Ins. Co., 1 Strob. (S. C.) 287.

[108] Francis v. Somerville Mut. Ins. Co., 1 Dutch. (N. J.) 78; Murdock v. Chenango Co. Ins. Co., 2 N. Y. 210.

[109] Lomas v. British Am. Assur. Co., 22 U. C. Q. B. 310; Heneker v. British Am. Assur. Co., 13 U. C. Q. B. 99.

not avoid a policy conditioned to be void in case of any increase of risk, though the risk may be increased by the erection of the buildings.[110] The condition refers to acts over which the insured has control, and though the insured may own the adjoining land, yet the erection of buildings thereon which increases the risk by one holding under a lease executed prior to effecting the insurance will not avoid the policy.[111]

§ **2207. Increase or Change of Risks.**—Most policies of fire insurance contain a clause to the effect that the policy shall be void in case of any increase in the risk. In construing this clause, the intent of the parties is to be considered, as in all other parts of the policy. A strict construction against the insured will not be given to such a condition. The use of the property upon which the policy is issued must be considered, and the insurer is presumed to have assumed the risk in reference thereto.[112] Increase in risk resulting from adjacent premises over which the assured has no control will not avoid a policy of insurance, though it declares that if the "hazard is increased without the consent of the company in writing the policy shall be void." This condition applies only to the insured premises, or to property under the control of the assured.[113] So a risk is not necessarily increased, in case of a policy of insurance upon a distillery, by the fact that the assured kept on hand, and had at the time of the fire, thirty or forty barrels of whisky in the cellar, for a necessary and natural incident of the business would be to have some of the manufactured article on hand.[114] A subsequent sale under a pre-existing judgment or encumbrance does not increase the risk.[115] A mere trifling increase will not avoid the policy. There must be a substantial and material increase, such as the insurer could not reasonably from the terms of the policy have contracted to assume,[116] and where there is such

[110] Howard v. Kentucky & L. Ins. Co., 13 B. Mon. (Ky.) 282.
[111] Franklin F. Ins. Co. v. Grover, 100 Pa. St. 266.
[112] Holbrook v. St. Paul F. etc. Ins. Co., 25 Minn. 239.
[113] State Ins. Co. v. Taylor, 108 N. C. 196; 20 Am. St. Rep. 281.
[114] People's Ins. Co. v. Spencer, 53 Pa. St. 353; 91 Am. Dec. 217.
[115] Collins v. London Assur. Co., 165 Pa. St. 298; 30 Atl. Rep. 924.
[116] Crane v. City etc. Ins. Co., 3 Fed. Rep. 558; Wood v. Hartford F.

an increase, the policy is avoided.[117] Under a fire policy conditioned that if an engine be used upon the premises the president of the company shall appoint a committee to ascertain the amount of increase of risk, if any, by examination, and, if increased, the insured shall pay an additional premium, the use of the engine does not itself forfeit the policy, nor of necessity increase the risk; but if risk is increased and loss caused thereby, the insurer, in the event of no additional premium note being given, is released from liability, unless it has neglected to appoint the committee and make examination provided for.[118] The provision in a policy of insurance against an increase of risk by acts of the insured is an independent condition of itself, and is not to be controlled or limited by the previous provisions or specifications of the hazards. Therefore, an act done by the insured, although not included in the class of specified hazards, nevertheless avoids the policy if it increases the risk.[119] A condition forfeiting the policy if the property insured is so changed as to increase risk is not broken by a changed use of premises, as restaurant

Ins. Co., 13 Conn. 533; Allen v. Mutual Ins. Co., 2 Md. 111; Jones Mfg. Co. v. Mutual Ins. Co., 8 Cush. (Mass.) 83; Merriam v. Middlesex Ins. Co., 21 Pick. (Mass.) 162; Appleby v. Astor F. Ins. Co., 54 N. Y. 253; Parker v. Arctic F. Ins. Co., 59 N. Y. 1; Girard Ins. Co. v. Stephenson, 37 Pa. St. 293.

[117] Lounsbury v. Protection Ins. Co., 8 Conn. 459; Rice v. Tower, 1 Gray (Mass.), 426; Sanford v. Mechanics' Ins. Co., 12 Cush. (Mass.) 541; Bowman v. Pacific Ins. Co., 27 Mo. 152; Duncan v. Sun Ins. Co., 6 Wend. (N. Y.) 488.

[118] Schaeffer v. Farmers' Mut. F. Ins. Co., 80 Md. 563; 45 Am. St. Rep. 361. But in German Ins. Co. v. Hart (Ky. Super. Ct. 1894), 16 Ky. L. R. 344, it was held that a steam threshing machine, placed near a barn upon which a policy conditioned against increase of risk had been issued, was a temporary use in the nature of the business of the insured, and did not avoid the policy, although it was the cause of the destruction of the property.

[119] Dittmer v. Germania Ins. Co., 23 La. Ann. 458; 8 Am. Rep. 600. In this case the assured allowed a lot of loose and unbaled hay to be stored in the upper part of the building insured without giving notice to the insurers. It was held that although unbaled hay was not specially excepted from the hazards, yet from its very nature the risk was increased, and therefore it avoided the policy on that ground. See, also, Boatwright v. Ætna Ins. Co., 1 Strob. (S. C.) 281.

to that of paint and wagon shop, when evidence shows that such change diminished the risk.[120] If the policy simply contains a condition that "any increase of risk" will avoid it, any material increase will defeat the policy, and where such an increase is shown to have been made, there can be no inquiry into the fact as to whether the loss was caused by such increase of risk.[121] A provision of a policy requiring that if the circumstances affecting the risk shall be altered by the assured so as to increase the risk, without the consent of the underwriters, the policy shall be void, binds the assured not only not to make any alterations in the use of the property which shall increase the risk, but also obligates him not to discontinue the exercise of any precaution which it is represented in the application will be adopted with a view to diminish the risk, and a failure to substantially comply with such provision will release the underwriter.[122] The condition that a policy shall become void if the risk is increased by any means whatever within the control of the assured is not broken by his making a conveyance which is intended and accepted as a mortgage to secure the payment of a loan, unless it is found that the execution of such mortgage did increase such risk.[123] It has been decided that in case the policy is to be void if there is any change by which the degree of risk is increased without the consent of the company, a change which is the result of accident is not within the meaning of the provision.[124]

§ 2208. Notice of Increase of Risk—Waiver.—As a general rule, if the policy is conditioned to be void in case notice is not given to the insurers of any increase of risk, failure to give notice will defeat a recovery on the policy for any

[120] Esch v. Home Ins. Co., 78 Iowa, 334; 16 Am. St. Rep. 443.

[121] Hoffecher v. Newcastle Co. Mut. Ins. Co., 5 Houst. (Del.) 101; Lyman v. State Ins. Co., 14 Allen (Mass.), 329; Mead v. North Western Ins. Co., 7 N. Y. 530.

[122] Houghton v. Manufacturers' etc. Ins. Co., 8 Met. (Mass.) 114; 41 Am. Dec. 489.

[123] Crittenden v. Springfield F. & M. Ins. Co., 85 Iowa, 652; 39 Am. St. Rep. 321.

[124] Brennan v. Liverpool etc. Ins. Co., 51 Cal. 101; 21 Am. Rep. 703.

subsequent loss.[125] A similar rule also prevails where by-laws of a mutual company containing a provision such as the above are made a part of the policy.[126] The insured is bound only to give notice to the company of any change of which he has knowledge, and by which he knows the rate of insurance will be increased, when the conditions of the policy require him to give notice to the company of any change in the insured or neighboring premises, or in the use or occupation of the same, whereby the risk is increased so as to increase the rate of insurance.[127] If an insurance on a "builder's risk" on a factory and its machinery, the building being in the course of construction, stipulates for notice to the company as soon as manufacturing is ready to begin, and that the rate shall be adjusted, but that the use of the premises so as to increase the risk shall avoid the policy, there must be a notice or readjustment of the rate before the actual beginning of manufacturing, and there must be a notice of a use or occupancy beyond the ordinary hazard of a builder's risk, otherwise the policy will be void, but the fact of manufacturing without notice of readjustment, or of increase or risk without notice or consent, is for the jury.[128] But where by the terms of a

[125] Peoria Sugar R. Co. v. People's F. Ins. Co., 24 Fed. Rep. 773; Gardiner v. Piscataqua M. F. Ins. Co., 38 Me. 439; Kern v. South St. Louis etc. Ins. Co., 40 Mo. 19; Franklin F. Ins. Co. v. Graves, 100 Pa. St. 266.

[126] Calvert v. Hamilton Mut. Ins. Co., 1 Allen (Mass.), 308; 79 Am. Dec. 744.

[127] Rife v. Lebanon M. Ins. Co., 115 Pa. St. 530; 2 Am. St. Rep. 580.

[128] Phœnix Ins. Co. v. Franklin Brass Co., 7 U. S. C. C. A. 144; 8 U. S. App. 451; 58 Fed. Rep. 166. "We think the court should have instructed the jury in simple positive terms: 1. That unless the insurer was previously notified of the readiness of the insured to commence manufacturing operations, and unless the rate of insurance was adjusted and fixed, an actual commencement of the manufacturing of goods would release it; and 2. That during the period antecedent to readiness for commencing the work of manufacturing, if the insured so used or occupied the premises as to increase the risk of the insurer beyond the ordinary hazard of builders' risks, the latter would not be responsible for loss by fire if its consent had not been given upon previous notice; leaving it to the jury to decide upon the questions of fact whether there had, before the fire, been a commencement of manufacturing operations without notice of readiness to commence to the insurer and without a readjustment of the

policy the insured was bound to give notice to the company of an increase of risk, and the company was to have the option thereupon to terminate the insurance, and the insured did increase the risk, but failed to notify the company thereof, and the insured property was subsequently destroyed, but not by reason of such increased risk, it was held that the liability of the company on the policy still continued, as it could not be certainly assumed that the company, if notified, would have terminated the insurance.[129] If the policy is to be void in case notice of any increase of risk is not given, notice must be given within a reasonable time, in the absence of any limitation as to time in the policy.[130] And where it is optional with the insurer as to whether an increase avoids the policy, the decision must also be made within a reasonable time.[131] Notice of an increase of risk given during the life of the original policy will run through subsequent renewals.[132] Knowledge of the agent of a mortgagee for whose benefit a bulding is insured that the owner of the building is doing that which increases the hazard, is knowledge of the mortgagee, within a provision of the policy avoiding it in case of increase of hazard not communicated to the company.[133]

§ **2209. Prohibited Use of Premises.**—The fact that the insured property is described in the policy as being used for a certain purpose does not constitute a warranty that there shall be no other use subsequent to effecting the insurance. Though there may, however, in the absence of any express stipulation, be a change in the use, yet if there is such a change as increases the risk, the policy will be void. No change which does not increase the risk will avoid the pol-

rate; or, if not, whether there had been an increase of the risk of fire without notice to or consent of the insurer. The court erred in failing to give such instructions": Phœnix Ins. Co. v. Franklin Brass Co., 8 U. S. App. 460, per Hughes, D. J.

[129] Joyce v. Maine Ins. Co., 45 Me. 168; 71 Am. Dec. 536.

[130] Pim v. Reid, 6 Man. & G. 1; Canada L. Co. v. Canada A. Ins. Co., 17 Grant Ch. (U. C.) 418.

[131] Lattomus v. Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 404.

[132] People's Ins. Co. v. Spencer, 53 Pa. St. 353.

[133] Cole v. Germania F. Ins. Co., 99 N. Y. 36.

icy.[134] The policy may, and generally does, prohibit any change in the use or occupation of the insured premises. A frequent condition is that prohibiting any change which shall increase the risk. Where a policy contained a condition avoiding it in case the premises "shall be occupied or used so as to increase the risk," and at the time of the insurance there was a planer in the mill which was used occasionally to plane lumber cut in the mill, and this use was continued after the policy was issued, it was held that the condition only prohibited a new and different use from that to which the property was applied when the policy was issued and a use by which the risk was increased.[135] A condition of this nature is held to be a continuing warranty.[136] The fact that the prohibited use was not with the knowledge or consent of the insured, but was the act of some third party in possession, has been held to avoid the policy the same as if done by the insured himself.[137] Where the owners of a flour mill, the insurance upon which provided that it should be void if appropriated to other purposes, devoted a part of the mill for several months to the coopering business, it was held that the policy was avoided.[138] In an action upon a policy of insurance which contained a stipulation that if the premises should be "appropriated or used" for carrying on the trade of a carpenter, etc., the policies should be of no force or effect so long as any portion of the premises was so appropriated or used, and while the policy was running a box manufactory was established on the premises, but work therein had been temporarily suspended for some months before the building was destroyed by fire, it was held that the mere setting up of the machinery, etc., for the manufacture of boxes was not such an "appropriation" of a part of the premises to carpenter's work as avoided the

[134] Wood v. Hartford Ins. Co., 13 Conn. 533; Blood v. Howard F. Ins. Co., 12 Cush. (Mass.) 472; Reynolds v. Commerce Ins. Co., 47 N. Y. 597; Crane v. City Ins. Co., 2 Flip. (C. C.) 576.

[135] Whitney v. Black River Ins. Co., 72 N. Y. 117; 28 Am. Rep. 116.

[136] Germania F. Ins. Co. v. Dechard, 3 Ind. App. 361; 28 N. E. Rep. 868.

[137] Witherell v. City F. Ins. Co., 16 Gray (Mass.), 276; First Nat. Bank of Ballston v. Insurance Co., 50 N. Y. 45.

[138] Harris v. Columbia Ins. Co., 4 Ohio St. 285.

policy, and had no other effect than to suspend the policy while the factory was in actual operation.[139] Keeping a barroom for the purpose of retailing liquors to boarders and others does not constitute the keeper a tavern-keeper, within the meaning of a provision within a policy against carrying on that occupation.[140]

§ **2210. Meaning of "Premises" as Used in Condition.** The word "premises," as used in the policy, has been held to mean "building."[141] So where a policy was issued upon a stock of goods, and was conditioned to be void in case gunpowder was stored "upon or in the premises insured," it was held that "premises" referred to buildings, and not to goods, and that the keeping of gunpowder in the stock insured was not a keeping "upon or in the premises insured."[142]

§ **2211. Prohibited Uses—Hazardous and Extra-hazardous.**—Another frequent condition of the policy is that which stipulates that if the premises shall be appropriated or used for any purposes which are denominated as hazardous or extra-hazardous, the policy shall be void. Such a condition has been held to amount to a promissory warranty that there shall be no such use of the premises.[143] In cases where a certain use or uses of the premises are prohibited such use or uses will avoid the policy, whether the change has thereby increased the risk or not.[144] If an insurance is effected upon a building which is to be used for a purpose denominated as hazardous in the list of hazards which is stated in the policy, the rule seems to be that any change of use to a purpose which is included in the same list of hazards will not

[139] United States etc. Ins. Co. v. Kimberly, 34 Md. 227.

[140] Rafferty v. New Brunswick Ins. Co., 18 N. J. L. (3 Har.) 480.

[141] Robinson v. Mercer Co. Mut. Ins. Co., 3 Dutch. (N. J.) 134; Mosely v. Vermont F. Ins. Co., 55 Vt. 142.

[142] Leggett v. Ætna Ins. Co., 10 Rich. (S. C.) 202.

[143] Mead v. North Western Ins. Co., 7 N. Y. (3 Seld.) 530.

[144] Allen v. Insurance Co., 2 Md. 111; Jones v. Manufacturers' Ins. Co., 8 Cush. (Mass.) 82; Stetson v. Insurance Co., 4 Mass. 330; Grant v. Howard Ins. Co., 5 Hill (N. Y.), 10.

avoid the policy.[145] The occasional occupation of the premises insured for purposes called hazardous in the conditions annexed to a policy of fire insurance will not avoid the policy; if such an occupation is connected with the buildings insured, there must be direct appropriation of the property to such use or purpose before the covenant is broken.[146] The privileges for all the purposes of the business insured will include an occupation necessary for the carrying on of such business, although it may be excepted in the provision against occupations denominated extra-hazardous.[147] Under the clause of a fire policy making it void if any unauthorized hazardous trade increasing the risk is carried on in the building, the fact that such trade is carried on avoids the policy, no matter what was the cause or origin of the fire, or that such trade was carried on by the tenant of the assured without his knowledge or consent, and the fact that the insured had no knowledge of the prohibited use will not preserve the policy.[148] If there has been a breach of this condition, and the premises have been used for a prohibited purpose, the fact that the loss has not occurred from such use will not avail the insured. The policy is conditioned to be void in case of a prohibited use, and where there is such a use, the policy is void though the loss is caused by some risk which the policy insures against, and not by the prohibited use.[149] Conditions in a policy of fire insurance exempting the insurers from liability in case of the carrying on of extra-hazardous occupations in the building are not conditions precedent, but matters of de-

[145] Reynolds v. Commercial Ins. Co., 47 N. Y. 597; Smith v. Mechanics' & Traders' F. Ins. Co., 52 N. Y. 399.

[146] Merchants' etc. Ins. Co. v. Washington etc. Ins. Co., 1 Handy (Ohio), 408.

[147] Lounsbury v. Protection Ins. Co., 8 Conn. 459; 21 Am. Dec. 686.

[148] Howell v. Baltimore etc. Soc., 16 Md. 377; Mead v. North Western Ins. Co., 7 N. Y. 530; Hoxsie v. Providence Mut. Ins. Co., 6 R. I. 517.

[149] Mead v. North Western Ins. Co., 7 N. Y. 530; Jones v. Manufacturers' Ins. Co., 8 Cush. (Mass.) 82; Murdock v. Chenango Co. Ins. Co., 2 Const. (N. Y.) 210; Clark v. Manufacturers' Ins. Co., 2 Wood & M. (U. S. C. C.) 472; 5 Fed. Rep. 692.

fense, and therefore need not be negatived in the declaration.[150]

§ 2212. **Where Policy is Only Suspended During a Temporary Prohibited Use.**—If the policy, instead of being conditioned to be void in case of a prohibited use, provides that so long as the premises shall be so appropriated or used the policy shall cease to be of force and effect, this clause will simply cause a suspension of the policy during the time of such prohibited use. In case of a prohibited use under such a condition, the insured may recover in case of a loss, provided that at the time of a loss the prohibited use has ceased and the risk has not been increased by such temporary use.[151]

§ 2213. **Uses not Violation of the Conditions as to Prohibited Use.**—A clause in a policy of insurance that a "carpenter's shop" is prohibited is not violated by the employment of a carpenter to make necessary repairs about the premises.[152] Nor does the employing of a carpenter for an occasional day's work about the insured premises avoid a policy conditioned to be void if the premises are used for any trade, business, or vocation classed as hazardous.[153] The making of brooms by hand has been held not to be within the meaning of a condition that the policy shall be void if the building is used for "mills and manufactories of any kind."[154] The condition against a change of use is not violated by the use of a stove in the insured building, where such use is connected with the work of finishing the building.[155]

§ 2214. **Change in "Situation or Circumstances Affecting the Risk."**—The insured contracts with reference to

[150] Lounsbury v. Protection Ins. Co., 8 Conn. 459; 21 Am. Dec. 686.

[151] New England Ins. Co. v. Wetmore, 32 Ill. 22. Compare Smith v. Mechanics' Ins. Co., 32 N. Y. 399. See, also, Lounsbury v. Protection Ins. Co., 8 Conn. 459; Heenan v. Missouri Ins. Co., 12 Iowa, 126; Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9.

[152] Lounsbury v. Protection Ins. Co., 8 Conn. 459.

[153] Westchester F. Ins. Co. v. Foster, 90 Ill. 121. See, also, Grant v. Howard Ins. Co., 5 Hill (N. Y.), 10.

[154] Franklin F. Ins. Co. v. Brock, 57 Pa. St. 74.

[155] Troy F. Ins. Co. v. Carpenter, 4 Wis. 20.

the ordinary use of the insured premises, and any use which is necessary to the proper use and enjoyment of the property will not avoid the policy, unless expressly prohibited. Thus, where before the issuing of a policy of fire insurance a dummy-engine had been used near the insured building as often as its use was required, it was held that its subsequent use when required, although it increased the risk, did not make void the policy under a provision therein contained that "if the situation or circumstances affecting the risk shall be so altered or changed as to increase the risk," the policy should be void.[156]

§ **2215. Condition as to Smoking upon the Premises.** A condition in a policy of insurance that there shall be no smoking upon the insured premises is fulfilled if the insured complies with the condition on his part, and exercises reasonable diligence and care in preventing others from smoking on the premises. It is an undertaking on the part of the insured that there shall be no smoking with his consent.[157]

§ **2216. Ceasing to Operate Factory—Operating Factory at Night.**—A condition in a policy of insurance upon a building used for manufacturing purposes that it shall be void if the factory ceases to be operated, is not avoided by a merely temporary suspension of business, either for the purpose of repairs or for the want of materials.[158] If, however, the

[156] Commonwealth v. Hyde, 112 Mass. 136; 17 Am. Rep. 172.

[157] Insurance Co. of North America v. McDowell, 50 Ill. 120; 99 Am. Dec. 497. Here the court said: "In the application it was stated that smoking was not allowed. It appears that at one time smoking was done in the mill, but that it was prohibited by the insured as soon as they were informed that it was prohibited by the policy, and a notice was posted in the mill. This was some time before the loss. In such a case the insured only undertakes that he will not do the act or allow others to, if he can, by reasonable precaution, prevent it. Where the insured prohibited smoking and posted the notice, he did all that was required of him": See Aurora F. Ins. Co. v. Eddy, 55 Ill. 213.

[158] American F. Ins. Co. v. Brighton Cotton Mfg. Co., 125 Ill. 131. In this case Scott, J., said: "After policy was written lease was made with the consent of the company. The lessees had operated the mill up to within a week of its destruction. Then most of the hands were discharged until their services should be again needed. There is evi-

policy specifies a certain number of days as the limit of its ceasing to be operated, as where it is conditioned to be void if the mills insured should remain idle, from any cause whatever, for the period of twenty days without notice to the company, it is held that the fact that the premises are closed for the purpose only of making necessary repairs is immaterial, where done in violation of the condition.[159] If the insurer knows that continuous operation of an ice factory is impossible, the policy will not be avoided by a vacancy or cessation of operation for ten days, although the policy may be so conditioned.[160] So where the policy stipulated that it should be avoided if the manufactory insured should cease to be operated for more than ten consecutive days, and the agent of the insurer, knowing that operations were compelled to be suspended during certain seasons of the year, owing to the freezing of the water in the mill-race, had granted repeated renewals of said policy, a renewal term extending over the period of the loss operates as a waiver of the condition, even though during said renewal term the operations have ceased, owing to said cause, for more than the stipulated period.[161] Again, the temporary closing of an insured mill for forty-two days without notice to the insurers, when such closing is caused by want of logs to manufacture, such logs being daily expected, but detained by low water, is not such "ceasing to op-

dence to show that the employees understood that the suspension of work was to be but for a short time. For the purpose of starting up, the lessees were getting in coal and doing other things indicating an intention to resume business. All the plant and much valuable material was in the building. One of the lessees was at the building when fire was discovered, and had come there with money to pay persons engaged as laborers about the mill. It is plain that the building was at no time 'vacant and unoccupied' in the sense those terms are used in the policy": Brighton Mfg. Co. v. Redding F. Ins. Co., 33 Fed. Rep. 232; Brighton Mfg. Co. v. Fire Ins. Co. of Philadelphia, 33 Fed. Rep. 234; Brighton Mfg. Co. v. Reliance Ins. Co., 33 Fed. Rep. 235; Brighton Mfg. Co. v. Fire Ins. Co. of Pennsylvania, 33 Fed. Rep. 236; Lebanon Mut. Ins. Co. v. Leathers (Pa.), 8 Atl. Rep. 424; Poss v. Western Assur. Co., 7 Lea (Tenn.), 704; 40 Am. Rep. 68.

[159] Day v. Millowners M. F. Ins. Co., 70 Iowa, 710.

[160] Morotock Ice Co. v. Paukey, 91 Va. 259; 21 S. E. Rep. 487.

[161] Bellevue Roller Mill Co. v. London & L. F. Ins. Co. (Idaho, 1895), 39 Pac. Rep. 196.

erate" as will avoid a policy of fire insurance providing that it shall become void if "the mill shall cease to be operated" without notice to or consent of the insurers.[162] A condition in a policy of insurance that the insured shall not run the factory at night without permission from the company indorsed upon the policy, is binding upon the insured.[163] But it is held that if a policy containing such a condition is issued and delivered by a general agent of the company, who has knowledge of the fact that the factory has always been operated at night, and also knows that such use is to be continued, and it is in fact continued with his knowledge, the condition is waived.[164] If a policy insuring a mill provides that the policy shall be void if the mill is run extra hours, but fixes no hours within which the mill may run, it cannot be declared void merely because the mill is sometimes run nights.[165]

§ 2217. **Use of Stoves on Premises—Fires.**—In the absence of any provision prohibiting the use of additional stoves upon the insured premises, the mere putting up of additional stoves will not avoid the policy, unless it be shown that the risk has been thereby increased.[166] The fact that the insured has stated in his application "no stoves used" does not constitute a continuing warranty that none shall be used.[167] The policy may, however, prohibit the use of stoves entirely, or limit their use, and if the condition is violated, it will avoid the policy. Thus, where a policy prohibited the building of any fire upon the insured premises except in a small stove in the office, it was held that the placing of a stove in another part of the building and its subsequent use without the consent of the insurers would avoid the policy.[168] A

[162] City Planing etc. Co. v. Merchants' etc. Ins. Co., 72 Mich. 654; 16 Am. Rep. 552.

[163] Reardon v. Faneuil Hall Ins. Co., 135 Mass. 121.

[164] American Cent. Ins. Co. v. McCrea, 8 Lea (Tenn.), 573; 41 Am. Rep. 647. Compare Houghton v. Manufacturers' Mut. Ins. Co., 8 Met. (Mass.) 114.

[165] German-American Ins. Co. v. Steiger, 109 Ill. 254.

[166] Newhall v. Union etc. Ins. Co., 52 Me. 180.

[167] Aurora F. Ins. Co. v. Eddy, 55 Ill. 213.

[168] Daniels v. Equitable F. Ins. Co., 50 Conn. 551.

covenant in the policy that insurer "will not be answerable for any loss arising from the use of fires in buildings unprovided with a good, substantial stove or brick chimney" does not require that a stove in which fires are used should be built into and form part of a brick chimney.[169]

§ **2218. Use of Premises for Unlawful Purposes.**—If it is provided by the policy or by the by-laws of a mutual company that, in case the insured buildings are appropriated to any illegal uses, the agent of the company must insist that such use shall cease, or else cancel the policy, the appropriation of the building to an illegal purpose will not of itself avoid the policy.[170] But if a policy is conditioned to be void in case the building is used for an unlawful purpose, it is avoided by the storage and sale of intoxicating liquors without a license;[171] and it is held that such unlawful use will avoid the policy, though insured had no knowledge thereof.[172] The commission, however, of a crime upon the premises will not avoid the policy. The condition refers to some actual and continued use of premises which is illegal.[173]

§ **2219. Prohibited Uses Which will Avoid the Policy.**—If a policy prohibits certain trades as "specially hazardous" and "extra-hazardous," the use of a part of the insured building for any of such trades will avoid the policy, and in such a case it is not necessary to show an increase of risk.[174] The keeping of confectionery in glass jars for the purpose of sale will avoid a policy which enumerates "confectionery" among hazardous risks which are prohibited.[175] So also will the carrying a sailmaker's stock of goods and tools

[169] Madsden v. Phœnix Ins. Co., 1 S. C. 24.

[170] Behler v. German Mut. F. Ins. Co., 68 Ind. 347.

[171] Kelly v. Worcester Ins. Co., 97 Mass. 284.

[172] Kelly v. Worcester Ins. Co., 97 Mass. 284; Jones v. Fireman's Ins. Co., 2 Daly (N. Y.), 307; 51 N. Y. 318.

[173] Boardman v. Merrimac etc. Ins. Co., 8 Cush. (Mass.) 583.

[174] Matthews v. Queen City Ins. Co., 2 Cin. (Ohio) 109; Lea v. Howard Ins. Co., 3 Gray (Mass.), 583; Dewees v. Manhattan Ins. Co., 35 N. J. 366.

[175] Wetherell v. City etc. Ins. Co., 16 Gray (82 Mass), 276.

into the loft of a building, though work has not actually been commenced, if the policy prohibits any hazardous business, and enumerates "sailmakers" in that clause.[176] And the keeping of a bawdy-house will avoid a policy upon a dwelling-house which is conditioned to be void in case of a change of use.[177] Where a house insured is occupied by a tenant at the time of the delivery of the policy and of the loss, the fact that the premises were used for an unlawful purpose without the knowledge of the insured will not avoid the policy when it does not prohibit such illegal use and the loss does not result therefrom.[178]

§ 2220. Waiver of Forfeiture on Account of Prohibited Use.—If the insurer after knowledge of uses which constitute a forfeiture, continues to treat the policy of insurance as an existing valid contract, the forfeiture is waived. Thus, where the insurer, after knowledge of the fact that the premises had been used for prohibited purposes, fixed no increased rate of premium, and continued to collect the regular assessments upon the policy, the forfeiture was held to be waived.[179]

§ 2221. Notice in Case of Change of Use.—Where it is provided by the by-laws of a mutual insurance company that, in case the property is subjected to a more hazardous use, notice shall be given to the secretary, it has been held that a verbal notice to the general agent of the company, the treasurer, and one of the directors is sufficient, and will continue the policy in force.[180]

§ 2222. Effects of Acts of Tenant upon Insured Property.—If the risk has been increased, or if certain prohibitions of the policy have been violated by the tenant of the insured, this will be equivalent to a violation of the provisions

[176] Wetherell v. City etc. Ins. Co., 16 Gray (82 Mass.), 276.

[177] Cedar Rapids Ins. Co. v. Shimp, 16 Bradw. (Ill.) 248.

[178] Nebraska Ins. Co. v. Christensen, 29 Neb. 572; 26 Am. St. Rep. 407.

[179] Witt v. Western Mut. F. Ins. Co., 1 Mo. App. 188.

[180] Planter's Mut. Ins. Co. v. Rowland (Md.), 7 Atl. Rep. 257.

by the insured himself, and will avoid the policy.[181] If the policy is conditioned to be void in case of any change of risk by assured "or others,"[182] or in case of any increase of risk "by any means within his control," [183] the acts of tenants to whom he lets the premises will avoid the policy, though the insured has no knowledge of such acts. Where, however, the policy was conditioned to be void in case of any changes within the "control or knowledge" of the insured, it was held that acts of tenants in violation of the conditions of the policy, and of which the insured had no knowledge, would not defeat a recovery on the policy.[184] It has been held that, under the ordinary condition of a policy, the fact that the owner of the premises has no knowledge that the risk has been increased or conditions as to the use of premises violated by the tenant will be no defense to a condition for forfeiture.[185] There are, however, cases which hold that the right of the insured to recover cannot be defeated by any acts of a tenant, unless done with the knowledge and consent of insured.[186]

§ **2223. Change of Occupancy—Tenancy.**—If the policy contains no provision as to change of tenants, occupancy, or possession, it has been held that a mere change of tenants

[181] Liverpool etc. Ins. Co. v. Gunther. 116 U. S. 113; Appleby v. Firemen's etc. Ins. Co., 45 Barb. (N. Y.) 454; Diehl v. Adams Co. Ins. Co., 58 Pa. St. 443.

[182] Shepard v. Union Ins. Co., 38 N. H. 232.

[183] Appleby v. Firemen's Ins. Co., 45 Barb. (N. Y.) 454; Wetherell v. Insurance Co., 16 Gray (Mass.), 276.

[184] Merrill v. North American Ins. Co., 23 Fed. Rep. 245; Nebraska & I. Ins. Co. v. Christiansen, 29 Neb. 572; 45 N. W. Rep. 924.

[185] Liverpool etc. Ins. Co. v. Gunther, 116 U. S. 113; Long v. Beeber, 106 Pa. St. 466; 51 Am. Rep. 532; Duncan v. Sun F. Ins. Co., 6 Wend. (N. Y.) 489; Howell v. Baltimore Eq. Soc., 16 Md. 377; Kelly v. Worcester Ins. Co., 97 Mass. 294; Diehl v. Adams Co. Mut. Ins. Co., 58 Pa. St. 443; Fire Assn. of Pennsylvania v. Williamson, 26 Pa. St. 196. In this case the court said: "It is not material that the landlord did not know that his tenant kept gunpowder. His contract with the insurance company was that it should not be kept without their permission, and it was his business to see that his tenants did not violate the contract."

[186] White v. Mutual etc. Assur. Co., 8 Gray (Mass.), 566; Hoxie v. Providence Ins. Co., 6 R. I. 517; Heneker v. British American Assur. Co., 14 U. C. C. P. 57.

will not avoid the policy, though it may appear that the new tenant is more careless than the former.[187] This would certainly be true if there were no increase of risk, as the insured by his statement, when obtaining the insurance, that the premises are occupied by a certain person does not warrant by such statement that the person then in possession shall continue in possession during the life of the policy. If, however, the risk is materially increased by the change of tenants, it would seem that the policy would be avoided. A policy conditioned to be void in case "any change be made as to tenancy or occupancy" is not avoided by the fact that the tenant removes from the premises.[188] There is said to be no change such as is contemplated by the condition until the new tenant enters.[189] The clause "change of occupants," as used in a policy of insurance, has been held to apply to personalty as well as real estate.[190] The vacancy of the premises has been held not to be "change in the nature of the occupancy," as the condition is intended to refer to an occupation for a different purpose.[191]

§ **2224. Effect of Non-occupation of Insured Premises where Policy only Prohibits Increase of Risk.**—If a policy prohibits any increase of risk, and contains no prohibition or clause in regard to the premises becoming vacant or unoccupied, then the mere fact that the premises become vacant or unoccupied will not avoid the policy, unless the risk is materially increased. It has been held, however, that the fact that the premises become vacant and unoccupied will not avoid the policy, unless there is an express stipulation to that effect, even though the risk may be increased.[192] Where a

[187] Lyon v. Commercial Ins. Co., 2 Rob. (La.) 266; Gates v. Madison Co. Mut. Ins. Co., 5 N. Y. 469; Hobson v. Wellington Ins. Co., 6 U. C. Q. B. 356. See sec. 2103, herein.

[188] Somerset Co. Mut. F. Ins. Co. v. Usaw, 112 Pa. St. 80; 56 Am. Rep. 307.

[189] Alston v. Old North St. Ins. Co., 80 N. C. 326; 8 Ins. L. J. 428.

[190] Walradt v. Phœnix Ins. Co., 64 Hun (N. Y.), 129; 19 N. Y. Supp. 293.

[191] Gould v. British American Assur. Co., 27 U. C. Q. B. 473.

[192] Gamwell v. Merchants' & Farmers' M. F. Ins. Co., 12 Cush. (Mass.) 67.

policy simply provided that if the risk was increased by any means within the control of the insured the policy should be void, and if by any means not within his control notice should be given to the company which might avoid the policy it was held that a temporary vacancy between one tenancy and another was to be regarded as a part of the risk, and, in case of a longer vacancy, it was sufficient to notify the company thereof.[193] Where a building occupied as a dwelling-house was insured as such, the policy providing that if the condition or circumstances of the property should be so changed by the act of the insured as to materially increase the risk, the policy should become void, unless the consent of the insurer to the change was obtained, it was held that the non-occupancy of the building for a year prior to its destruction by fire was not a change within the meaning of the condition in the policy.[194] Where buildings of a poor class on a cheap farm in a remote settlement without near neighbors were burned while vacant, it sufficiently appeared that the risk was increased by the vacancy so as to avoid the policy, under a condition to that effect in the policy, although the statute provided that vacancy should not be a forfeiture unless the risk was thereby increased.[195] In an action upon a policy which provided that, in case there was any change affecting the occupancy of the property whereby the risk was increased, notice should be given to the company, but which did not declare that the vacating of the premises was an increase of risk, it was held that the right of the insured to recover could not be defeated by the fact that he had moved out of the premises without notifying the insurer.[196]

§ 2225. Vacant or Unoccupied—Meaning of this Term. A stipulation that the policy shall be void in case the prem-

[193] Lockwood v. Middlesex M. Ins. Co., 47 Conn. 553. See Luce v. Dorchester Ins. Co., 105 Mass. 297; Insurance Co. v. Hannum, 11 Monaghan (Pa.), 369.

[194] Gilliat v. Pawtucket etc. Ins. Co., 8 R. I. 282; 91 Am. Dec. 220.

[195] Lancy v. Home Ins. Co., 82 Me. 492; 20 Atl. Rep. 79.

[196] Residence F. Ins. Co. v. Hannewald, 37 Mich. 103.

ises become vacant or unoccupied is to be construed in view of the situation and character of the property insured, and the ordinary incidents and contingencies affecting the use to which it and other property situated similarly and of like character is subject.[197] In construing such a condition the courts will look to the subject matter of the contract. The occupancy of a dwelling, of a mill, or of a barn is each essentially different in its scope and character, and the construction must be with reference thereto.[198] The word "occupied," in reference to a dwelling place, means actual use of the premises by human beings as their customary place of abode.[199] If, however, the policy be upon a factory or mill, and contains a vacancy clause, it is not necessary for any one to reside in the building during the night season, unless the policy expressly requires it. The occupation of the premises as a storehouse will not be a compliance with the condition; there must be some actual use thereof in accordance with the purposes and use of such a building.[200] These words not being synonymous, care must be taken in construing the conditions in which they are used. If a policy is conditioned to be void in case the premises become "vacant or unoccupied," the existence of either condition will avoid the policy.[201] But if, on the other hand, the policy contains the condition that it shall be void in case the premises are left "vacant and unoccupied," then they must be both vacant and unoccupied in order to defeat a recovery.[202] If there is an exception of liability in case an insured dwelling-house remains unoccupied for seven days, and it is continuously unoccupied for a longer period, the court may properly direct a verdict for the insurer.[203] A building is not vacant or unoccupied where a

[197] Whitney v. Black River Ins. Co., 72 N. Y. 117; 28 Am. Rep. 116.

[198] Continental Ins. Co. v. Kyle, 124 Ind. 132; 19 Am. St. Rep. 77.

[199] Bonenfant v. American F. Ins. Co., 76 Mich. 653; 43 N. W. Rep. 682; Weidert v. State Ins. Co., 19 Or. 261; 20 Am. St. Rep. 809; 19 Ins. L. J. 740; 24 Pick. (Mass.) 242.

[200] Halpin v. Insurance Co. of North America, 120 N. Y. 70.

[201] Herman v. Adriatic Ins. Co., 85 N. Y. 162; 39 Am. Rep. 644.

[202] Hermann v. Merchants' Ins. Co., 81 N. Y. 184; 37 Am. Rep. 488.

[203] Thompson v. Caledonia F. Ins. Co. (Wis. 1896), 66 N. W. Rep. 801.

tenant has only partially moved out his furniture the day preceding the fire, leaving a portion thereof remaining in the building.[204] If a policy upon leased premises contains a condition prohibiting vacation of occupation without the written consent of the insurer, a reasonable time must be allowed to carry out a change of tenants or occupancy, without imposing upon the insured the penalty of either an intended or permitted vacation of the insured premises.[205] The term "vacant or unoccupied," relating to a clause of forfeiture of insurance on a dwelling "to be occupied by the assured or tenant," has not such a definite signification that the assured is not entitled to rely on the statement of the agent that the policy would remain valid for thirty days after a tenant removed.[206] If several buildings are insured by one policy conditioned to be void in case "the premises" become unoccupied, the word "premises" is held to cover the entire property insured, and so long as any building continues to be occupied, the policy is not avoided.[207] There must be a substantial change of risk to constitute a change of occupancy.[208]

§ **2226. Provision as to Notice in Case Premises become Vacant or Unoccupied.**—A provision in a policy of insurance that if the premises become vacant or unoccupied notice must be given to the company, or else the policy shall be void, is binding, and in such case if notice is not given, the policy is avoided. Where a policy provided that if the house should be "left unoccupied" without giving immediate notice to the company "the policy shall cease and be of no force and effect," it was held that the absence of the occupant of the house for a period of six weeks, no notice being given, would avoid the policy.[209] But if immediate notice is given, and the company does not cancel the policy, it has been held that the

[204] Liverpool L. & G. Ins. Co. v. Buckstaff, 38 Neb. 146; 56 N. E. Rep. 695. See German American Ins. Co. v. Buckstaff, 38 Neb. 136.

[205] Dowd v. Citizens' Ins. Co., 141 Pa. St. 47; 23 Am. St. Rep. 263.

[206] Hotchkiss v. Phœnix Ins. Co., 76 Wis. 269; 44 N. W. Rep. 1106.

[207] Herman v. Adriatic F. Ins. Co., 85 N. Y. 162; 39 Am. Rep. 644.

[208] Driscoll v. German-American Ins. Co., 74 Hun (N. Y.), 153; 56 N. Y. St. Rep. 294.

[209] Paine v. Agricultural Ins. Co., 5 Thomp. & C. (N. Y.) 619.

insured may recover for a loss subsequently occurring, though no indorsement has been made on the policy.[210] The failure of the insured to give notice in such a case for such a period of time is inexcusable neglect.[211] But it has been held that notice is not necessary where there is only a temporary interruption incidental to changed tenants.[212] Where a policy required notice in case the premises became vacant for more than thirty days without notice to the company, it was held that the policy was avoided where the premises were vacated on January 12th, and so remained until February 13th, when a fire occurred.[213] A policy which provided that if premises insured should "become vacant or unoccupied, and so remain without notice to and consent from this company in writing . . . . this policy is void," was held to be avoided where a tenant of the property covered by the policy vacated the building, and it remained unoccupied for seventeen days, no notice being given to the company.[214] Where a policy provided that if the insured premises become vacant notice of "the particulars of such vacation or removal" must be given to the company, or else the policy should be void, it was held that the policy was avoided by the removal of the occupant with substantially the whole of his household goods, notice being given to the company that the occupant was going away on a visit, but that his household goods were to remain in the building.[215]

§ **2227. "Unoccupied Premises."**—A fire policy which provides that so long as the insured premises shall be "unoccupied . . . . these presents shall cease and be of no force and effect," is not absolutely void in case of non-occupancy; the policy is only suspended, and will revive when the premises become occupied again.[216] It has been held that a stipu-

[210] Wakefield v. Orient Ins. Co., 30 Wis. 532.
[211] Alston v. Old North St. Ins. Co., 80 N. C. 326.
[212] Alston v. Old North St. Ins. Co., 80 N. C. 326.
[213] Hartford F. Ins. Co. v. Webster, 69 Ill. 392.
[214] Denison v. Phœnix Ins. Co., 52 Iowa, 457. Compare American Ins. Co. v. Foster, 92 Ill. 334.
[215] Hill v. Equitable M. F. Ins. Co., 58 N. H. 82.
[216] Ætna Ins. Co. v. Myers, 63 Md. 238.

lation in a policy that a house is to be "occupied all the year round" is satisfied if permanent occupation is resumed so long before the fire that the temporary absence of the occupant plainly appears to have had no connection with the loss.[217] In an action upon a policy upon a trip-hammer shop and machinery therein, the policy providing that it should be void if the premises remained unoccupied more than thirty days, it was held that the following instructions to the jury were correct: "It is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around to see if things were right, but some practical use must have been made of the building." [218] A provision in the policy upon a manufacturing establishment that the policy shall be void if the premises become unoccupied refers to more than a merely temporary suspension of business. Thus, where a mill stopped work for five days, it was held that the premises were not unoccupied,[219] and the premises were held not to be unoccupied where there was a temporary cessation of business occasioned by a prevalence of yellow fever.[220] A policy which covered a "ten tenement frame block," which consisted of flats, was held not to be unoccupied while two of the tenements were in actual use and occupation as residences.[221] The condition in a policy of insurance that if the house insured shall cease to be occupied, or shall be unoccupied at the time of effecting insurance and is not so stated in the application, the policy shall be void, is intended to protect the company against an increase of risk by reason of the house being vacant. Hence, it is not broken when a house which is insured as "unoccupied" is temporarily occupied and then vacated by a tenant before it is burned.[222] A dwelling-house and barn are unoccupied, within the meaning of an insurance policy which provides

[217] Ring v. Phœnix Ins. Co., 145 Mass. 387.

[218] Keith v. Quincy etc. Ins. Co., 10 Allen (Mass.), 228.

[219] Albion Lead Works v. Williamsburg City Ins. Co., 2 Fed. Rep. 479.

[220] Poss v. Western Assur. Co., 7 Lea (Tenn.), 704; 40 Am. Rep. 68.

[221] Harrington v. Fitchburg F. Ins. Co., 124 Mass. 126.

[222] Bennett v. Agricultural Ins. Co., 106 N. Y. 243; 12 N. E. Rep. 609.

that buildings unoccupied shall not be covered by the policy, where the house is only used by the insured and his servants for the purpose of taking their meals there, when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools.[223] A dwelling-house is unoccupied where the tenant removes to another farm a considerable distance away, leaving only a few small articles of furniture in the insured building, and making only occasional visits to the same.[224] A policy which provides that it shall be void in case the insured building is unoccupied for more than thirty days is avoided where the insured and tenant have abandoned the property for more than that period. The fact that the building is occupied by a person will not protect the policy if the person has no authority to occupy it and pays no rent.[225] Where a summer dwelling-house was insured against fire, and it was provided that it was "not to be left unoccupied any portion of the year," and at the time the policy was issued S., an employee of the former owner, with his family, occupied four rooms in one wing, and in March of that year, the plaintiff employed H., a gardener, to take charge of the place, who was to take S's quarters when he moved out, and S. moved out the 5th of April, and on March 22d H. went to the place alone, in consequence of his wife's sickness, and took board at a neighbor's and continued there, having charge of the place and the keys of the house after S. moved out, and on April 19th the house was destroyed by fire, it was held that the policy was avoided.[226] A policy which provides that it shall be void if the building becomes unoccupied is void the instant such building is unoccupied, and no recovery can be had for a loss occurring a few hours after the occupant has removed.[227] A building is still unoccupied though it is let to a tenant who has placed certain articles

[223] Ashworth v. Builders' Mut. F. Ins. Co., 112 Mass. 422; 17 Am. Rep. 117.

[224] Hartshorn v. Agricultural Ins. Co. (N. J.), 13 Cent. Rep. 132.

[225] Western Assur. Co. v. McPike, 62 Miss. 740.

[226] Sonneborn v. Insurance Co., 15 Vroom (N. J.), 220; 43 Am. Rep. 365.

[227] Bennett v. Agricultural Ins. Co., 51 Conn. 504. See, also, Insurance Co. of North America v. Garland, 108 Ill. 820; Denison v. Phœnix

therein for the purpose of cleaning, but has not taken up his residence in the building.[228] Where the building insured consisted of a house and two barns, and the house was only occupied a part of the time during the currency of the policy, it was held that there was not an occupancy of the premises within the meaning of the condition.[229]

§ 2228. "Vacant" Premises.—The mere temporary absence of the occupant of a building will not avoid a policy conditioned to be void in case the building becomes "vacant." To render the building vacant there must be a permanent removal from the house, and an abandonment of the same as a place of residence.[230] A house is not vacant so as to avoid a policy if, on the same day on which a tenant moves from the building, the insured remains in and about the premises, and also on the same day makes preparation to move into the insured building, and leaves a man in charge of it while he is so doing.[231] Where a house that has been rented has been vacated by the tenant, and the owner, intending to occupy it himself, takes possession the next day, has it papered and painted, moves his furniture, etc., into it, keeps his employees in and about the house from six in the morning till seven or eight in the evening, preparing it for occupancy, and the day before he expects to move in the house is destroyed by fire, it will not be considered as vacant within the meaning of a policy declaring that the insured shall not be liable for any loss or damage occurring while the insured property is vacant or unoccupied.[232] And in another case, where the tenant moved out and the landlord immediately moved his things in and began preparations for his own occupancy of the building, it

Ins. Co., 52 Iowa, 457; Cook v. Continental Ins. Co. (Mo.), 9 Ins. L. J. 887; Farmers' Ins. Co. v. Wells, 42 Ohio, 519.

[228] Litch v. North British & M. Ins. Co., 136 Mass. 491. See Barry v. Prescott Ins. Co., 35 Hun (N. Y.), 601; 39 Hun (N. Y.), 410.

[229] Bishop v. Norwich Union F. Ins. Co. (U. S. S. C. 1894), 14 Can. L. T. 311.

[230] Springfield F. & M. Ins. Co. v. McLimans (Neb.), 45 N. W. Rep. 171; Cummins v. Agricultural Ins. Co., 67 N. Y. 260; 23 Am. Rep. 111.

[231] Dowd v. Citizens' Ins. Co. (Pa.), 28 Week. Not. Cas. 20; 21 Atl. Rep. 505.

[232] Eddy v. Hawkeye Ins. Co., 70 Iowa, 472; 30 N. W. Rep. 808.

was held that the building was not "vacant," and that he could recover for a loss occurring while he was away on a business trip and before he had slept in the house.[233] If a policy provides that it shall be void in case the premises are vacated, the fact that the use of the premises for the purpose for which they were used when the insurance was affected has ceased will not defeat the policy, where the insured continues to reside on the premises,[234] or about which he constantly has men, and also uses it as a place of deposit for his papers.[235] If the policy provides that if the premises become vacant it shall be void, it is not necessary that the vacancy should increase the risk, as the violation of the condition itself avoids the policy. So an instruction that if the jury believe that if the house was vacant as prohibited in the policy, and "further believe from the evidence that the risk was thereby increased," they should find for the defendant, was held erroneous.[236] Where the occupants of an insured building moved to another town, taking all of the wearing apparel and part of the furniture, it was held that the premises must be considered as "vacated" within the meaning of the policy.[237] A policy of insurance which provides that it shall be void if the premises become vacant without the written consent of the insurer indorsed on the policy is avoided where the buildings are unoccupied and the furniture removed therefrom, some fodder only being left in one of the outer buildings.[238] Where a policy containing a condition as to vacancy was issued upon a schoolhouse, and the school was discontinued, and the building was subsequently occupied as a dwelling until April, and was then vacant until the 14th of October, when it was burned while unoccupied, it was held that the insurance was forfeited.[239] Where the insured who, upon renew-

[233] Shackleton v. Sun F. Ins. Co., 55 Mich. 288; 54 Am. Rep. 379.

[234] Kimball v. Monarch Ins. Co., 70 Iowa, 513.

[235] Williams v. North-German Ins. Co., 24 Fed. Rep. 625.

[236] Galveston Ins. Co. v. Long, 51 Tex. 89.

[237] Sleeper v. New Hampshire Ins. Co., 56 N. H. 401. See, also, American Ins. Co. v. Padelfield, 78 Ill. 167.

[238] Watertown F. Ins. Co. v. Cherry, 84 Va. 72; 3 S. E. Rep. 876.

[239] American Ins. Co. v. Foster, 92 Ill. 334; 34 Am. Rep. 134.

ing his policy, had been in the habit of receiving merely a receipt therefor, but on this occasion was given a new form of policy, which contained a new vacancy clause, being changed from a thirty-day clause to a ten-day one, it was held that he was presumed to know the contents of the new policy, and that equity would not relieve him from a forfeiture where the premises had been vacant for over ten days prior to the loss.[240] A temporary vacancy by an occupant, there being an intention to return, has been held not to be a "removal." [241] A policy conditioned to be void if the premises become vacant will be avoided where they become vacant by the removal of the tenant without the knowledge or consent of the insured.[242]

§ **2229. Conditioned to be Void if Premises become "Vacant and Unoccupied."**—As we have stated in a preceding section, if a policy is conditioned to be void in case the premises become "vacant and unoccupied," the premises must not only be vacant, but unoccupied. Both conditions must exist. Thus, where a person procured an insurance on his summer dwelling, and removed from it in November, leaving the furniture in it, and leaving it in care of a person residing near it, intending to re-occupy it the next spring, it was held that the dwelling was not thus "vacant and unoccupied," and the insurance was not void.[243] The words "vacant and unoccupied," when used in a policy of insurance in connection with the idea that the insurer is stipulating against an increase in the risk from the absence of persons from the premises insured, must be regarded as interchangeable, and equivalent in meaning. If no one lives in the house, it is both vacant and unoccupied, though it may contain articles of furniture which the last occupant failed to remove.[244] A dwelling-house was held not to become "vacant and unoccupied" when the tenant

[240] Thompson v. Southern Mut. Ins. Co. (Ga. 1892), 24 Atl. Rep. 754.

[241] Cummings v. Agricultural Ins. Co., 67 N. Y. 260.

[242] McClure v. Watertown F. Ins. Co., 90 Pa. St. 277; 35 Am. Rep 656.

[243] Herman v. Merchants' Ins. Co., 81 N. Y. 184; 37 Am. Rep. 488.

[244] Moore v. Phœnix Ins. Co., 62 N. H. 240; 13 Am. St. Rep. 556.

and his family left it for twelve days to visit a sick daughter, and another person, at his request, visited it daily and looked after it.[245] A policy issued upon several buildings for one gross sum as the consideration, the amount of the policy being apportioned among the different buildings, which is conditioned to be void if the premises "become vacant and unoccupied," is not avoided by the vacancy of one of the buildings.[246] A building used for manufacturing purposes is not "vacant and unoccupied" where a company temporarily stops work and makes repairs, but retains the night and day watchman on duty up to the time of the fire, the plant and some manufactured material not being disturbed.[247] Where active work in a sawmill is temporarily discontinued from causes incident to the business, the premises are not thereby "vacant and unoccupied." [248] A vessel which is beached, the furniture being removed and there being no occupant thereon, is "vacant and unoccupied." [249] An insured building is "unoccupied," within the meaning of an insurance policy stipulating that it shall be void if the premises are "vacant and unoccupied" for a certain length of time, in a case where the tenant, who occupies the building as a store, closes and abandons it before the end of the term, leaving therein only a small amount of merchandise of nominal value, although he retains the key to the building at the request of the insured.[250] The fact that a previous policy on the same property did not contain any condition against the property being vacant and unoccupied does not prevent such condition from being inoperative when there is no pretense of fraud or mistake, and

[245] Stupetski v. Trans-Atlantic F. Ins. Co., 43 Mich. 373; 38 Am. Rep. 195.

[246] McQueeny v. Phœnix Ins. Co., 52 Ark. 257; 5 L. R. Annot. 744; 12 S. W. Rep. 498.

[247] American F. Ins. Co. v. Brighton Mfg. Co., 125 Ill. 131; 15 West. Rep. 180; Brighton Mfg. Co. v. Redding F. Ins. Co., 33 Fed. Rep. 232; Brighton Mfg. Co. v. Fire Assn. of Philadelphia, 33 Fed. Rep. 234; Brighton Mfg. Co. v. Reliance Ins. Co., 33 Fed. Rep. 235; Brighton Mfg. Co. v. Fire Ins. Co. of Pennsylvania, 33 Fed. Rep. 236.

[248] Whitney v. Black River Ins. Co., 72 N. Y. 117.

[249] Reid v. Lancaster F. Ins. Co., 19 Hun (N. Y.), 284.

[250] Home Ins. Co. v. Scales, 71 Miss. 975; 42 Am. St. Rep. 512.

the assured had ample opportunity to examine his policy and learn its contents.[251] If the policy has become void by reason of a violation of a condition against nonoccupancy without the consent of the insurer indorsed on the policy it is not revived when occupation of the premises is subsequently resumed.[252] So in Texas, if the policy provides that vacancy without the consent of the company will avoid the policy, and the unearned premium will be returned, a temporary vacancy without the knowledge of the owner avoids the policy, and subsequent re-occupancy of the building does not revive the policy, unless the forfeiture has been waived.[253] So a condition against vacancy of an insured dwelling-house is not complied with by the placing of farm implements therein by the insured after the removal of a tenant therefrom.[254]

§ 2230. Conditioned to be Void if the Premises become "Vacant or Unoccupied."—Under a condition containing these words, it is not necessary that the premises should be both vacant and unoccupied. The existence of either condition will avoid the policy. A policy upon a mill conditioned to be void in case the "premises shall become vacant or unoccupied" is not avoided by a temporary suspension of business.[255] Where an insured manufacturing establishment is leased by the insured, and the tenant thereafter ceases business, leaving the building closed and in charge of one who lives in a house upon the premises about fifteen feet from the factory, who is intrusted with the keys and visits the premises three or four times a week, the premises are unoccupied within the meaning of a condition that the policy shall be void in case of the premises becoming vacant or unoccupied.[256] An

[251] Eylaw v. Westchester F. Ins. Co., 81 Wis. 583; 29 Am. St. Rep. 917.

[252] Moore v. Phœnix Ins. Co., 62 N. H. 240; 13 Am. St. Rep. 556.

[253] East Texas Ins. Co. v. Kempner, 87 Tex. 229; 47 Am. St. Rep. 99.

[254] Martin v. Rochester German Ins. Co., 86 Hun (N. Y.), 35; 33 N. Y. Supp. 404.

[255] City Planing etc. Co. v. Merchants' Ins. Co., 72 Mich. 654; 40 N. W. Rep. 777.

[256] Halpin v. Ætna F. Ins. Co., 30 N. Y. St. Rep. 259; 19 Ins. L. J. 459; 23 N. E. Rep. 988.

insured building is not "vacant or unoccupied" from the mere absence of the insured from the building for a few days in order to attend a funeral, though no occupant is left in the house,[257] or by the absence of the family from the house for several days for the purpose of making a visit,[258] or by the absence of the occupants of the insured house on the night of the fire.[259] Where a tenant moved out of an insured house on Tuesday, the owner took possession on Wednesday, and until Friday evening was engaged in preparing the house for his own occupation, intending to move into it on Saturday, and on Friday night the house was burned, it was held that the policy was not invalidated on the ground that the house was vacant or unoccupied.[260] Where the tenant moved out on March 15th and on May 5th the premises were burned, it was held that the building was not "vacant or unoccupied" when during the interval, the owner had visited the house frequently, and had had one of her servants sleep there every night.[261] A policy containing a provision that it shall be void if the premises become vacant or unoccupied is avoided where the tenant, being notified to leave, does so with the consent and knowledge of the owner of the premises,[262] and it is held that a policy containing such a condition is avoided by the permanent removal of the tenant, though made without the landlord's knowledge.[263] An insured dwelling which has been abandoned as a dwelling two days before its loss by fire, and with no intention to return, is in law vacant within the meaning of an insurance policy providing that it shall be void if at any time the house shall become vacant and unoccupied.[264] If a policy provides that it shall be void in case the premises become

[257] Franklin F. Ins. Co. v. Keppler, 95 Pa. St. 492.

[258] Johnson v. New York Bowery F. Ins. Co., 39 Hun (N. Y.), 410; O'Brien v. Commercial F. Ins. Co., 6 Jones & S. (N. Y.) 517.

[259] Laselle v. Hoboken F. Ins. Co., 43 N. J. L. 468.

[260] Eddy v. Hawkeye Ins. Co., 70 Iowa, 472.

[261] Traders' Ins. Co. v. Race, 31 Ill. App. 625; 29 N. E. Rep. 846; 21 Ins. L. J. 363.

[262] Richards v. Continental Ins. Co. of New York, 83 Mich. 508; 47 N. W. Rep. 350.

[263] Farmers' Ins. Co. v. Wells, 42 Ohio St. 519.

[264] Richards v. Continental Ins. Co., 83 Mich. 508; 21 Am. St. Rep. 611.

wholly or partially vacant or unoccupied, it is avoided by the removal of a tenant, and the fact that the owner visits the building each day and some tools are kept there will not preserve the policy.[265] It is held that the premises are not "vacant or unoccupied" where the person, who is engaged in repairing the buildings, sleeps there nightly.[266] Where a policy issued upon a building occupied as a store and dwelling-house was conditioned to be void in case it became vacant or unoccupied, it was held that the policy was not avoided by the insured ceasing to occupy it as a dwelling-house, where he continued to occupy it as a store.[267] A condition that if the premises become "vacant or unoccupied, or not in use," the policy shall be void, cannot be made to depend upon the insured's knowledge of the fact of such vacancy.[268] If a house is left for an entire season with no one in it, a policy containing a condition that it shall be void if the premises become "vacant or unoccupied" is avoided, though the furniture be left therein.[269] Although a house is built for a dwelling-house, the fact that the insured lodges and eats in an adjacent house, but uses the former building for cooking and general work in connection with the latter, does not make the former "vacant or unoccupied."[270] In many policies it is provided that if a building "becomes vacant and unoccupied, and so remains" for a certain number of days, which generally range from ten to thirty, the policy shall be void. Under a Massachusetts policy thirty days is the time specified.[271]

§ 2231. Waiver of Condition as to Premises being Vacated.—These conditions, like all of the others which

[265] Feshe v. Council Bluffs Ins. Co., 74 Iowa, 676; 39 N. W. Rep. 87. See, also, Franklin etc. Inst. v. Central Ins. Co., 119 Mass. 240.

[266] Hartford F. Ins. Co. v. Smith, 3 Colo. 422.

[267] Burlington Ins. Co. v. Brockway, 138 Ill. 644; affirmed, 39 Ill. App. 43; 28 N. E. Rep. 799.

[268] Schuermann v. Dwelling House Ins. Co. (Ill. S. C. 1896), 43 N. E. Rep. 1093; affirming 57 Ill. App. 200.

[269] Herrman v. Adriatic F. Ins. Co., 85 N. Y. 162; 39 Am. Rep. 644. See, also, Alston v. Insurance Co., 80 N. C. 326; Fitzgerald v. Connecticut F. Ins. Co., 64 Wis. 463.

[270] Dwelling House Ins. Co. v. Osborn (Kan. 1895), 40 Pac. Rep. 1059.

[271] Acts Mass. 1887, c. 214, sec. 60. See Hill v. Equitable M. F. Ins. Co., 58 N. H. 82.

are inserted for the benefit of the insurer, may be waived by the insurer, either by some acts dispensing with a performance of the conditions, or by some act which constitutes a waiver of a forfeiture incurred as a consequence of a breach of the conditions. In such a case the insurer is estopped from setting up a breach of such conditions in defense to an action upon the policy.[272] Where the policy was conditioned to be void if the premises became vacant and so remained for twenty days, the issuance of the policy upon unoccupied premises is not a waiver of the condition, as by the terms thereof the insured is bound to have the house occupied with a period of twenty days.[273] A waiver of forfeiture resulting from a breach occasioned by change in occupancy of a building increasing the risk extends not only to breaches occasioned by the occupancy before such waiver, but to those resulting from a continuation of such occupancy.[274] If at the date of the policy, and subsequently, the insurer knew that the building was vacant and unoccupied, and so remained, it is presumed that the condition as to vacancy is waived.[275] Again, if a policy of insurance is void at its inception because it contains a warranty that the premises were occupied, when in fact they were vacant, a subsequent notice to the insurer that they were vacant at the time of the giving of the notice cannot give life to the policy; and the consent of the insurer to the vacancy will not constitute a waiver by him of the forfeiture caused by the premises not being occupied when the policy was issued, unless such consent was given with full notice of all the facts.[276] Where a policy was issued upon a building in the course of construction, and there was a vacancy permit for a period of thirty days indorsed on the policy, and it appeared that the agent of the insurers promised to renew this indorsement if the building was not completed at the end of that

[272] Viele v. Germania Ins. Co., 26 Iowa, 9; 96 Am. Dec. 83. See, also, Cousin v. Pennsylvania Ins. Co., 46 Pa. St. 323.

[273] Connecticut F. Ins. Co. v. Tilley, 88 Va. 1024; 14 S. E. Rep. 851; 21 Ins. L. J. 558.

[274] Viele v. Germania Ins. Co., 26 Iowa, 9; 96 Am. Dec. 83.

[275] West Coast Lumber Co. v. State etc. Ins. Co., 98 Cal. 502.

[276] Boyd v. Insurance Co., 90 Tenn. 212; 25 Am. St. Rep. 676.

time, and to continue making such renewal until completed, and such renewal was twice indorsed by the agent, but omitted a third time by indavertence, it was held that the provision declaring the policy void if the building was unoccupied for a period of ten days had been waived.[277] Where a policy of fire insurance provided that it should be void if the building insured became vacant without the indorsed consent of the insurer, that no agent had power to waive any condition, that no waiver of a condition was valid unless indorsed, and that any person other than the insured who procured an insurance to be taken by the company was deemed the agent of the insured, and not of the insurer, and a building insured thereunder became vacant with the knowledge of the agent authorized to receive and issue policies, but not of the company, and the insured presented proofs of a loss occurring during such vacancy, and the company, without raising the objection of vacancy, required further proofs, which the insured furnished at an expense to himself, it was held that the insured was entitled to recover on the policy.[278] If the company or its agent when the policy is issued has knowledge that the premises are vacant or unoccupied, it is held that the issuance of the policy under such conditions will be a waiver of any clause therein as to non-occupancy or vacancy.[279]

§ **2232. Restrictions in Life Policy as to Residence—Travel, etc.—Waiver.**—A condition ordinarily inserted in policies of life insurance is that imposing a restriction upon the insured as to the limits within which he may reside or travel. The companies may prescribe certain limits for travel or residence in life policies, and where such conditions exist, they are binding upon the insured, and a violation thereof will

[277] Dupuy v. Delaware Ins. Co., 63 Fed. Rep. 680; 24 Ins. L. J. 161.

[278] Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108; 28 Am. Rep. 535.

[279] Commercial Ins. Co. v. Spankneble, 52 Ill. 53; Jordan v. State Ins. Co., 64 Iowa, 216; Germania F. Ins. Co. v. Klewer, 27 Bradw. (Ill.) 590; Sentell v. Oswego Co. Farmers' Ins. Co., 16 Hun (N. Y.), 516; Short v. Home Ins. Co., 90 N. Y. 16; 43 Am. Rep. 138; Haight v. Continental Ins. Co., 92 N. Y. 51; Devine v. Home Ins. Co., 32 Wis. 471. See Short v. Home Ins. Co., 90 N. Y. 16; 43 Am. Rep. 138; Williams v. Niagara F. Ins. Co., 50 Iowa, 561.

avoid the policy.[280] Thus, where a person escaped from imprisonment from New York, and went to Vigo, Spain, which was beyond the limits stated in the policy, it was held that the policy was avoided, and that the insured could not claim a paid-up policy.[281] This condition restricting the right of the insured as to travel and residence may, like other conditions, be waived by the insurer or his agents. Thus, where the agent of the insurer received premiums from the insured with knowledge of the violation of this condition, it was held that the forfeiture was waived.[282] But where a party had forfeited his policy by residing within prescribed limits without a permit, and after his death, but before knowledge of the fact, an agent of the company gave a receipt to a friend of the insured for the money to pay for a permit, but the company never issued the permit, and the agent upon hearing of the death tendered back the money, it was held that there was no waiver of the forfeiture.[283]

§ **2233. Same Subject—Construction of Phrase "Settled Limits of the United States."**—The phrase in a policy "settled limits of the United States," has been construed as meaning the geographical limits or boundaries of the United States, without regard to the fact as to whether such portions are all inhabited or not.[284] The contention was made in this case by the company that this phrase referred to the region of settlements. Upon this point the court said: "What are we to understand by the 'region of settlements,' and when can a man be said to be within or beyond them? How quickly must or how sparsely may any given section of country be populated to come clearly within the scope of these terms? We have in the very heart of this state a vast region almost entirely untenanted by man, ... it is far enough beyond the region of settlements, and yet it would be a rather start-

[280] Nightingale v. State Mut. Ins. Co., 5 R. I. 38.

[281] Douglas v. Knickerbocker L. Ins. Co., 55 How. Pr. (N. Y.) 104.

[282] Wing v. Harvey, 23 L. J. Ch. 511; 5 De G. M. & G. 265; Girdlestone v. N. B. M. Ins. Co., 11 L. R. Eq. Cas. 197.

[283] Bennecke v. Connecticut Mut. L. Ins. Co., 105 U. S. 355.

[284] Casler v. Connecticut etc. Ins. Co., 22 N. Y. 427 (three judges dissenting).

ling proposition that any one who should happen to have such a policy as this, and who for the purposes of relaxation, amusement, or the love of adventure should penetrate that great wilderness, would by that act run the risk of forfeiting all his interest in the policy. . . . . Considerations like these seem inevitably to lead to the conclusion that the language of the policy must have been used to indicate the established boundaries of the country, and such, on the whole, I am satisfied is the interpretation that shall be given to them."

§ **2234. Restriction as to Travel—Construction of Permit to go beyond Prescribed Limits.**—A permit to travel beyond the limits prescribed by the policy is held to be an independent agreement, unless it be indorsed on the policy when the policy is issued, in which case it is considered a part of the contract.[285] Where a permit is couched in unambiguous terms, it must be strictly complied with by the insured.[286] Thus, where a person whose life was insured within the United States had permission to go to California and return home around Cape Horn, or by Vera Cruz, and, being taken sick in California, he returned home by way of Panama and Chagres, without the United States, and soon after died, it was held that the policy was thereby avoided, although there was then no usually traveled route by Vera Cruz, and although he returned the shortest and safest way.[287] If, however, the permit is expressed in language which is not perfectly clear, and a doubt arises, then it is to be construed strictly against the insurer so as to prevent a forfeiture.[288] So where the insured was granted a permit to go to Cuba, "he to take his own risk of epidemics," and while there he died of yellow fever, it was held that as yellow fever was not prevalent during the season in which he died, the company was liable.[289] And an

[285] Rainsford v. Royal Ins. Co., 52 N. Y. 526.

[286] Hathaway v. Trenton Mut. L. Ins. Co., 11 Cush. Mass. 448; Rainsford v. Royal Ins. Co., 52 N. Y. 626; Jones & S. (N. Y.) 453.

[287] Hathaway v. Trenton etc. Ins. Co., 11 Cush. (Mass.) 448.

[288] Notman v. Anchor Ins. Co., 4 Com. B., N. S., 476; 27 L. J. C. P. 275; 4 Jur., N. S., 712.

[289] Pohalaski v. M. L. Ins. Co., 56 N. Y. 645; 45 How. Pr. (N. Y.) 504.

insured person who has a permit to go by sea between certain ports "on first-class decked vessels," does not forfeit his policy by taking a steerage passage.[290] A permit to reside or travel in a prohibited territory, where it is intended to secure a present right or privilege, will, though it is post-dated, operate according to the intent of the parties.[291] If the insured by the terms of the application and the policy is described as residing in a certain locality, he has the right, without further permission, to continue his residence in that place, and the indorsement of a permit in such a case cannot restrict his rights.[292]

§ **2235. Where Insured is Prevented by Sickness from Returning within Time Limited by Permit.**—There are two cases in New York in which this question has arisen. In the earlier case[293] the facts were as follows: The insured was by an indorsement upon the policy permitted "to reside and travel on land in any part of the United States or by any of the regular steamers, to be north of the south bounds of Virginia by the tenth day of July, 1854." While in Florida, the insured was taken sick on June 11th, and died there on July 20th, being unable at any time during his sickness to return. The company was held liable, on the ground that absolute performance of the condition was excused by sickness, which was the act of God. Chief Justice Bosworth says: "As the policy in question is one upon the life of the deceased, I think the terms of the license or consent should be so construed as not to require him to attempt to return north of the south bounds of Virginia by the 10th of July, when in consequence of sickness suddenly and unexpectedly contracted or developed an attempt to do so would be certain, so far as the human mind can foresee results, to produce the death of the insured. . . . . He was taken and became so sick and ill in body as to be unfit and unable to travel and to start on his return home; and continued so until he died. I do not think the consent

[290] Taylor v. Ætna Ins. Co., 13 Gray (Mass.), 434.

[291] Walsh v. Ætna Ins. Co., 30 Iowa, 133.

[292] Forbes v. American M. L. Ins. Co., 15 Gray (Mass.), 249; 77 Am. Dec. 360.

[293] Baldwin v. New York L. Ins. Co., 3 Bosw. (N. Y.) 530.

or license should be so construed as to require him to start in that condition with the certainty that if he did start he would die, in consequence of his sickness and of such acts on his part south of the south bounds of Virginia before the 10th of July, or north of those bounds immediately thereafter; that it could not have been the intention of the parties that the insured, under the state of facts established by the special verdict, should do acts which would make his death inevitable, in order to a proper performance on his part of his duty as prescribed and disclosed in such license and consent." In a later case[294] in the same state the insured, under a permit to go to New Orleans and remain there until July 1, 1870, went to that place, but remained there until his death on March 18, 1872. The plaintiff claimed that the insured became so sick and feeble that he was unable to return north, and consequently such return being rendered impossible by the act of God, he was excused from so doing, and the policy was not avoided. It appeared from the evidence that he was in feeble health when he went south. It did not, however, appear that he was unable at any time before July 1, 1870, to return north. The court, however, did not decide it upon this ground, though it considered it. The basis of the decision was that "he was feeble when he went, and he could not go so far south that he could not return, and, after remaining there until he was too feeble to return, enable the holder of the policy to claim that his return was rendered impossible by the act of God, and that thus the breach of the condition was executed." These two cases are not in conflict. In one the insured left the north in good health and was taken suddenly ill, and was unable to return, while in the other instance it appeared that he had left the north in feeble health. The rule to be drawn from the one case is, that if an insured person in good health, by permit, goes to a locality prohibited by the policy, and while there is taken ill, or becomes unable to return, the policy is not forfeited, as performance is rendered impossible by the act of God. In the other case, which does

[294] Evans v. United States L. Ins. Co., 64 N. Y. 304; 3 Hun (N. Y.), 587.

not deny this rule, it is held that if an insured person, while in feeble health obtains a permit and goes to prohibited localities, he does so at his own risk, and cannot allege that his return is rendered impossible by the act of God.

§ 2236. **Clause Prohibiting Change of Occupation—Construction of.**—A frequent condition in a life policy is one prohibiting the insured from engaging in a more hazardous occupation or employment than the one which he is engaged in at the time of the issuance of the policy, or in contemplation of which the risk is assumed. This prohibition as to a change of occupation does not refer to work which the insured may be merely temporarily or casually engaged in, and such work will not avoid the policy. It refers to work which the insured may be employed in as a regular or usual business.[295] Thus, it was held no breach of such a condition that the assured, who was a teacher and so described in the policy, occupied himself while out of professional employment in superintending the erection of a couple of buildings designed for his own use. Such superintending did not make him a builder.[296] A person who for a short time engages in hunting for a recreation is not engaged even temporarily in a prohibited occupation.[297] A provision in a life policy that the insured shall not be connected with a certain business or occupation refers wholly to the insured's occupation after contract of insurance has taken effect.[298] So engaging in a prohibited occupation in violation of the conditions avoids the policy.[299] Unless a policy by express terms restricts the company's liability to accidents occurring in that occupation in which the insured was engaged when the insurance was effected, a change in occupation, as to that of a brakeman from that of a switchman, will not avoid the policy.[300] It is held that a certificate of a

[295] Stone v. United States Cas. Co., 34 N. J. L. 371; North American Ins. Co. v. Burrows, 69 Pa. St. 43.

[296] Stone v. United States Cas. Co., 34 N. J. L. 371.

[297] Union Mut. Acc. Assn. v. Frohard, 134 Ill. 228; 25 N. E. Rep. 642.

[298] McGuirk v. Metropolitan L. Ins. Co., 56 Conn. 528; 1 L. R. Annot. 563.

[299] North Western M. L. Ins. Co. v. Ammerman, 119 Ill. 329; 10 N. E. Rep. 225.

[300] Providence L. Ins. Co. v. Fennell, 49 Ill. 180.

benefit society is not rendered void by a change of occupation to one which is denominated as extra-hazardous under a by-law of the society, where certain conditions are specified in the certificate and application, for a violation of which the contract shall be void, and this is not one of the conditions named.[301] If a person procures a permit to engage in an occupation prohibited by the policy, and continues in such occupation beyond the time allowed by the permit, the policy will be avoided.[302]

§ **2237. Prohibition as to Entering Military or Naval Service.**—If a provision is inserted in a life policy that it shall be void in case the insured shall enter the military or naval service without the consent of the company, such a stipulation includes such service as will render the insured liable to duty as a combatant, and has been held not to include a mere clerical occupation, as that of a clerk in the office of an adjutant-general who does not engage in an active service against the enemy.[303] So also it was held that service under the military authorities in the construction of a bridge was not within the meaning of such a provision.[304] If, however, the insured engages in active service, it will avoid the policy, though the service may be involuntary.[305]

§ **2238. Change in Possession, Title, or Interest.**—If the policy is conditioned to be void in case of any change in title or possession, a conveyance by deed absolute, which is in fact a mortgage, in order to enable the mortgagor's father to

[301] Hobbs v. Iowa Mut. B. Assn., 82 Iowa, 107; 11 L. R. Annot. 299; 20 Ins. L. J. 434; 47 N. W. Rep. 983.

[302] Ayers v. New England etc. Ins. Co., 109 Mass. 430. If a case is fairly left to the jury, a new trial will not be granted for "not directing the jury that the deceased was engaged at the time of his death in braking cars, which occupation was more hazardous than that of a shoemaker," the deceased being described as a shoemaker in his application, and his death being caused by accident while braking cars: Day v. Dominion Safety Fund L. Assn. (N. B. S. C. 1894), 14 Can. L. T. 349.

[303] New York L. Ins. Co. v. Hendren, 24 Gratt. (Va.) 540.

[304] Wells v. Connecticut etc. Ins. Co., 48 N. Y. 34.

[305] Dillard v. Manhattan Ins. Co., 44 Ga. 119.

obtain a loan, is not such a change in title or possession as will avoid the policy.[306] Where the policy provides that it shall be void if any change takes place in the interest, title, or possession of the subject of insurance, such provision has reference to change subsequent to the time of effecting the insurance.[307] Leasing the property and surrendering possession to the lessee is a change in the possession.[308] If a policy is conditioned to be void in case "any change takes place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise," an assignment for the benefit of the creditor will avoid the policy.[309]

§ **2239. Effect of Temporary Increase of Risk—Temporary Violation of Condition.**—Is the policy rendered absolutely void from that instant by a temporary increase of risk, or is it merely suspended during such temporary increase, again reviving, without the mutual consent of the parties, upon the cessation of such temporary increase? Must the increase of risk exist at the time of loss, irrespective of the fact whether the loss is occasioned thereby or not? The difficulty of formulating any positive rule governing this point is apparent from the decisions and opinions given in the note below. This question is, in reality, independent of the consideration whether a breach of condition or warranty avoids the policy from the instant of the breach, except where a breach of such condition also involves an increase of the risk. The most important factor is, What is meant by a temporary increase of risk?[310] Has the word "temporary" a mere reference to time, or to a substantial increase materially enlarging the risk to the

[306] German Ins. Co. v. Gile (Ill. S. C. 1896), 44 N. E. Rep. 490.

[307] Morotoch Ins. Co. v. Rodefer (Va. 1896), 24 S. E. Rep. 93.

[308] Wenzel v. Commercial Ins. Co., 67 Cal. 438.

[309] Orr v. Hartford F. Ins. Co. (Ill. S. C. 1895), 43 N. E. Rep. 866.

[310] Temporary is defined thus: "1. Lasting for a time only; 2. Existing or continuing for a time only; 3. Not permanent": Century Dictionary; Webster's Dictionary. "1. Lasting for a time only; 2. Transient; 3. Not in perpetuity": Stormouth's Dictionary (Harper's, 1885). "1. Lasting for a time only; 2. Intended to be used for a time only; 3. Not permanent": Standard Dictionary (Funk & Wagnalls, 1895).

injury of the assurer, or is the injury to assurer of importance? or does the word "temporary" have reference to any increase of risk not existing at the time of loss? Again, it would seem a pertinent inquiry whether the increase of risk was such a substantial one as that the insurer might have forfeited the policy at the time, had he been aware of it. If the increase is of such a character as to justify a forfeiture at the time, can it not be justly held that the insurer is injured thereby if the policy be deemed merely suspended, and the insurer is subsequently compelled to pay the amount of the insurance, simply because, without his fault, he had no knowledge at the time that his right to declare a forfeiture existed? Is this injury, if it be one, to the insurer offset by his nonliability during the existence of the increase of risk? Irrespective of the question of the breach of condition, it would seem that a mere temporary increase of risk can rarely be such a substantial, material increase as that the insurer might, upon the ground of increase of risk alone, have avoided the policy had he known the facts at the time. Therefore, time is an important factor, as well as the factors of substantial and material increase, since in determining the latter points the duration of the increase would in most cases have a bearing of greater or less weight, according to the circumstances. Again, the injury to the insurer cannot necessarily and of itself determine whether there is a substantial, material increase of risk. And we are inclined to the opinion that whatever temporary injury to the insurer may arise from a mere temporary, unsubstantial, and immaterial increase of risk, it is offset by the nonliability of the insurer in case of loss arising during said time. In this connection it may be added that if it be true that something more than a mere temporary increase of risk is necessary to justify a forfeiture, then the risk is merely suspended, and the question of revival of a forfeited policy is unimportant. Again, it may reasonably be argued that if the words of the contract are clear and unambiguous, the courts ought not to ingraft by construction upon the express terms of the policy a contract which the parties themselves have failed to incorporate, and which no legitimate rules of con-

struction will show to have been intended, for conditions are not to be enlarged or extended in favor of assured or assurer contrary to the plain import of the words used. We conclude, therefore, (1) that a mere temporary increase of risk, or a mere casual or accidental violation of the exact terms of the policy, would operate only to suspend the risk; (2) if a loss occurred during such suspension, the insurer would be released; (3) a mere temporary increase of risk would rarely be a substantial, material one; (4) the temporary increase of risk must be such a material and substantial increase as that the insurer could, had he known of it at the time, have declared a forfeiture therefor; (5) if it is a sufficiently substantial and material increase to justify a forfeiture at the time, the policy is avoided, and the increase of risk has become something more than a temporary one; (6) in such case as this last the question whether the increase of risk has ceased to exist at the time of loss is unimportant, unless involved in the question whether the policy has been revived by consent or waiver; (7) in determining whether the violation is a substantial and material one, the fact that it extends continuously over a considerable period of time ought to be an important factor, although there might be a mere temporary increase of risk occurring at infrequent intervals.[311]

[311] In view of the above conclusion, we append the following as pertinent: *Authorities.*—A change of use means a permanent change or habitual use, as distinguished from a single circumstance of change or use, providing the loss does not result therefrom: Shaw v. Robberds, 6 Ad. & El. 75; Insurance Co. v. Hughes, 10 Lea (Tenn.), 461; Williams v. People's Ins. Co., 57 N. Y. 274. So in a Pennsylvania case it was held that a change of the use of the property after the contract which increases the hazard suspends the insurance during its continuance: Cumberland Valley Mut. Prot. Co. v. Schell, 29 Pa. St. 31. There was an express stipulation in this case, but the court says: "Without this stipulation, such is the nature of the contract." In a New Hampshire case the procurement, contrary to a policy condition, of other insurance, which expired before the fire, was held to avoid the policy: Fabyan v. Insurance Co., 33 N. H. 203. So where further insurance was obtained, but before the loss the amount was brought within the limit allowed by the policy by the cancellation of some other policies, it was held a suspension only during the continuance of the overinsurance, but that the policy was not avoided and the company was held liable: Overmeyer v. Globe

Mut. Ins. Co., 43 Mo. 573; 5 Benn. F. I. Cas. 235. Upon a time policy covering a steamboat, in which the navigation of certain waters was excepted, and the boat made a trip upon those waters, returning in safety, and was subsequently burned, it was held that the navigation of those waters only constituted an exception to the perils covered and not a warranty; that the risk was merely suspended, and upon the vessel's safe return the insurers were liable under the policy: Greenleaf v. St. Louis Ins. Co., 37 Mo. 25. Again, where a tugboat was insured against fire, under a clause requiring it to navigate within certain limits, it was held that the insurer was not relieved from liability for loss occurring after the tug had returned to or while she was within the specified limits. In this case the policy contained nothing expressly stipulating that it should be void in case it navigated without the limits: Hennesey v. Manhattan F. Ins. Co., 28 Hun (N. Y.), 98. If a policy is issued on a sawmill, specifying its size, and it is so used, but an addition is built thereon, but with no partition between the two parts, and machinery is placed for a sash and blind factory in a larger portion of the entire building, there is no such misdescription or change as to avoid the policy, where the use of the sash and blind factory has been discontinued at the time of the fire: Garrison v. Farmers' Mut. F. Ins. Co., 56 N. J. L. (27 Vroom) 235; 28 Atl. Rep. 8. So the use of gasoline for light, it being named as increasing the risk, does not avoid the policy, where it was removed and subsequently the building was burned: Mutual F. Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407. The court in this case placed stress upon the fact that there was no provision in the policy making it void for temporary increase of risk ipso facto, but that such increase rendered the policy liable to be avoided if a loss arose therefrom, but that, "in the absence of a stipulation to this effect, the validity of the policy necessarily depends on the state of the premises at the time of the loss": Mutual F. Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 412. So the temporary introduction of benzine is not keeping it: Maryland F. Ins. Co. v. Whiteford, 31 Md. 219. In a Maryland case it is held that making repairs or alterations or additions to or erecting adjacent building will not prevent a recovery, although the risk is materially increased thereby, unless the loss is produced wholly or in part in consequence thereof, provided the policy contains no condition avoiding the same therefor: Washington F. Ins. Co. v. Symington, 30 Md. 92. Where the assured had at the time the policy was issued a license to keep a billiard or pool table or a bowling-alley for hire, under a statute requiring the same, and after the expiration of the license, during the life of the policy, he used the property without a renewal of the license for a short time, it was held that such temporary illegal use only suspended the policy during the continuance of said use. Such temporary use being uncontemplated at the time of taking out the policy, and it not appearing that the insurer was or could be in any way affected injuriously thereby after the illegal use had ceased, and the insurer had the benefit of the temporary suspension of risk without rebate of premium. And this is true even though the policy

provides against the keeping of certain specified articles, "or other articles subject to legal restriction": Hinckley v. Germania Ins. Co., 140 Mass. 38. In this case the court, per Allen, J., says: "There is no rule of law preventing a revival of a policy of insurance after a temporary suspension. 'The doctrine that the risk may be suspended and again revive without an express provision on that subject seems to be within the strictest judicial principles.' . . . . And in Worthington v. Bearse, 12 Allen (Mass.), 382, it was held on great consideration that if assured in a marine policy temporarily parts with his interest in the property insured, and afterward buys it again, the policy will revive if there are no express provisions making it void and there is no increase of risk . . . . It is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy that has once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phillips on Insurance, section 975, it is said: 'After it [the policy] has begun so that the premium is become due, it surely is but equitable that a temporary noncompliance should have effect only during its continuance. To carry it farther is to inflict a penalty upon the assured and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred . . . . And there does not appear to be any good reason why, in the absence of all fraud and of all prejudice to the underwriter, the same doctrine should not be applicable to express stipulations in the nature of warranties or conditions, unless by the circumstances or the express provisions of the policy such application is excluded.' In accordance with this doctrine, a provision of the policy that it should be void and be surrendered to the directors of the company to be canceled in case of alienation of the property by sale or otherwise was held to mean that it should be inoperative for the time being; and the assured, upon regaining title after a sale of the property by him, was held entitled to recover: Lane v. Maine Ins. Co., 12 Me. 44. So where a policy provided that 'in case of any transfer or termination of the interest, either by sale or otherwise, without such consent (i. e. of the company), this policy shall from thenceforth be void and of no effect,' it was held that after such sale the policy revived upon the assured's acquiring again the title and holding it at the time of the fire: Power v. Ocean Ins. Co., 19 La., O. S., 28; 10 La., N. S. 23. The same rule of construction has been applied to provisions against other insurance: Obermeyer v. Globe Ins. Co., 43 Mo. 573. The court in Illinois has gone so far as to apply it also to a provision against an increase of risk which has ceased before loss": Schmidt v. Peoria Ins. Co., 41 Ill. 295; Insurance Co. of North America v. McDowell, 50 Ill. 120, 129. It is noteworthy that in both the Maine case (above noted) and in the case in which the above opinion is given, the question was one concerning the continuance of insurable interest, and the court remarked, per Parris, J., in Lane v. Maine

Ins. Co., 12 Me. 47: "The party insured must, in all cases of fire insurance, have an interest in the property at the time of insuring and at the time the fire happens." While in the Louisiana case (above noted) the court, per Murphy, J., says: "It is sufficient if the insured has an interest in the subject matter of insurance at the time of insuring and at the time the fire happens." In the Obermeyer case (above noted) the court declared, Id. 578, per Bliss, J., "that the policies relied on to avoid the one containing the covenant of forfeiture should exist and be in force at the time of the loss." In New England Ins. Co. v. Schettler, 38 Ill. 166, it was held in this case that if such other insurance had ceased to exist at the time of the loss, the right of recovery would not be defeated. And in Mitchell v. Lycoming Ins. Co., 51 Pa. St. 402, the court, per Agnew, J., says (Id. 409), referring to the other policies, "if they were void at the time of the loss they constituted no obstacle." In the case of Schmidt v. Peoria Ins. Co., 41 Ill. 295, cited by the Massachusetts court above, it was expressly provided that "if, after insurance is effected, the risk be increased by any means or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of noneffect, and the question was whether the use of certain stoves therein, not in the building when the policy was issued, and in which fires had been used at a time more or less remote from the time of the loss, avoided the policy within the exception. The court, per Lawrence, J., who delivered the opinion, said: "This is a very material provision in the policy. . . . . This language admits of no controversy as to its meaning, and the only question under it is, Was there such increased risk in consequence of these stoves at the time of the fire? This court held in New England F. & M. Ins. Co. v. Wetmore, 32 Ill. 245, that the true construction of a clause like this was, that the policy became inoperative only while the increased risk was in existence and when it terminated the liability of the company would recommence . . . . The point for the consideration of the jury was, not whether an increase of the number of fires in a building does or does not ordinarily increase the risk, but whether, in the case then before the court, the risk to the building at the time it was destroyed, at 11 o'clock at night, was or was not increased by the two stoves, in one of which there had been no fire for eight days and in the other none after 8:30 o'clock of the preceding morning. Was the risk to this particular building at the time it was burned greater in consequence of the presence of these two stoves, placed as they were and used in the manner shown by the witnesses." This case is cited in North British & M: Ins. Co. v. Steiger, 13 Ill. App. 484, when at the time the insurance was effected a steam drier was used, and subsequently a fire drier was substituted, and the court, per McCulloch, P. J., citing also North Eastern F. & M. Ins. Co. v. Wetmore, 32 Ill. 221, says: "It is peculiarly within the province of the jury to determine, under proper instructions, whether or not there was an actual increase of risk, or whether or not the cause of such increase of risk was in operation at the time of the destruction of the building."

The principal case was also cited in Aurora F. Ins. Co. v. Eddy, 55 Ill. 221, which case, together with the principal one and that last above noted, were questions really of continuing warranties. In this last decision it was held that a substantial compliance as to keeping buckets filled with water in the building was necessary. The principal case is also cited in Insurance Co. of North America v. Garland, 108 Ill. 220, where the condition was that "if assured shall allow the building herein insured to become vacant and unoccupied and so remain," and the court, per Mulkey, J., says: "It is well settled that if the company should not exercise this power [that is upon notice of the breach to declare the policy forfeited] and the premises should again become occupied, its right to do so would cease and its liability on the policy would again attach." The Massachusetts decision above noted also cites Insurance Co. of North America v. McDowell, 50 Ill. 120, 129, which was a case of increase of hazard from repairs, and it was held that such increase only suspended the policy during its continuance, but that the insurer's liability was restored when the increase terminated: Citing Schmidt v. Peoria M. & F. Ins. Co., 41 Ill. 295; New England F. & M. Ins. Co. v. Wetmore, 32 Ill. 245. In another Massachusetts case a condition in a policy of insurance that it should become void if the situation or circumstances affecting the risk shall be so altered as to cause an increase thereof is not ordinarily violated by a mere temporary change increasing the risk, but a change existing continuously during the working hours of nearly a month is not temporary and is continued sufficiently long to be deemed a change in the situation and circumstances affecting the risk: First Congregational Church v. Holyoke M. F. Ins. Co., 158 Mass. 475; 35 Am. St. Rep. 508. Again, a policy prohibiting assignment without consent was held suspended merely, and not avoided, where an assignment, made without consent of company and objected to by their agent, was afterward so altered to a special assignment as to be acceptable to the agent: Manley v. Insurance Co. of North America, 1 Lans. (N. Y.) 20; 5 Benn. F. I. Cas. 241. Under a provision that the policy shall be void in case the premises shall be vacant or unoccupied, the contract is held only suspended during the time the premises are vacant: Schuermann v. Dwelling House Ins. Co., 57 Ill. App. 201. The condition here was: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . . if any change take place in the interest, title, or possession of the subject of insurance (except change of occupants without vacancy or unoccupancy or other increase of hazard) whether by legal process or judgment or by voluntary act of the insured or otherwise . . . . or if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied or not in use." So a temporary suspension of some parts of the business, or a temporary suspension of all work for want of materials, is not a breach of condition as to being "vacant and unoccupied": American F. Ins. Co. v. Cotton Mfg. Co., 125 Ill. 131. Where the policy stipulated that it should be void in case it should become vacant and unoccupied for more than ten days with-

out the company's consent indorsed on the policy, it was held that the policy was terminated upon a breach of the condition and could not be revived without the consent of both parties to the contract, and that it was immaterial, then, whether the loss of the buildings was due to unoccupancy or some other cause: Moore v. Insurance Co., 62 N. H. 240. The court, per Smith, J., says: "The defendants might have waived the condition altogether or might have waived its breach, but having had no opportunity before the loss to make their election to waive the breach, their refusal to pay when notified of the loss and unoccupancy was an effectual election that they insisted upon the condition in the policy." Where a house was vacant for several weeks, it was held that if there was no intentional abandonment, but the insured was using reasonable diligence to obtain a tenant, there was no forfeiture: Gamwell v. Merchants' Ins. Co., 12 Cush. (Mass.) 167; cited in Albion Lead Works v. Williamsburgh City F. Ins. Co., 2 Fed. Rep. 488. Where a building was insured to be occupied as a dwelling-house, it was held that a temporary use of a part of the building, which was terminated before any loss occurred, would not avoid the policy if the building had not ceased to be occupied as a dwelling-house, and the temporary change of use in a part of the building had in no way contributed to the loss: Kircher v. Milwaukee M. M. Ins. Co., 74 Wis. 470; 5 L. R. Annot. 779; 43 N. W. Rep. 487. If one procures a chattel mortgage on property contrary to the policy conditions, but at the time of the fire the property is free from the mortgage lien, there may be a recovery on the policy and the rule applies as to any encumbrance: Omaha F. Ins. Co. v. Dierks, 43 Neb. 473; 61 N. W. Rep. 740; reaffirming State Ins. Co. v. Schreck, 27 Neb. 527, to the same point. And it is here held that a policy of insurance on goods against loss by fire is not avoided by the use for a single night of the building in which they are stored as a shelter for the crew of a vessel, where the ship had filled with water, and the insurers are liable for a loss occasioned by the crew's making a fire, contrary to the express directions of the insured, in a stove which was in an unsafe condition at the time: Loud v. Citizens' Mut. Ins. Co., 2 Gray (Mass.), 221. Where a policy was issued upon a building to be used for storage purposes only, conditioned to be void in case it was used for any other purpose, and during a part of the term of the policy the building was used for canning purposes, but active work ceased before issuance of the renewal, it was held a fire being built in the furnace after the policy was renewed, for the purpose of emptying the water out of the pipes and boiler, that the insurers were liable for a loss occurring after such act: Krug v. German F. Ins. Co. (Pa. S. C. 1892), 23 Atl. Rep. 572. In another case the policy contained a condition prohibiting the appropriation or use of the premises for the exercise of certain specified trades, including those of "cooper, carpenter, cabinetmaker," except under special agreement in writing in or on the policy. The premises at the time the insurance was effected were used for making and storing barrels. Subsequently, small circular saws and a workbench were introduced, and boxes were manufactured, but this work had ceased from two

to four months when a loss by fire occurred. The saws and workbench had remained in the building, and a lathe had been put up the day preceding the fire, for the purpose of making broomhandles and brushblocks. In an action upon the policy it was held that the policy was suspended during the prohibited use of the premises, but was revived when the use ceased to exist, and that there was no such "appropriation" of the premises at the time of the fire to a prohibited use as was contemplated in the policy or as prevented a recovery: United States F. & M. Ins. Co. v. Kimberly, 34 Md. 224; 6 Am. Rep. 325. In this case Brent, J., said: "There is no doubt that the insured could not have recovered if the premises had been used for the manufacture of boxes at the time of the fire. The parties, however, have contracted that such use destroys the effect of the policy 'so long as the premises shall be appropriated or used' for any of the prohibited purposes. The plain meaning is that it is to have no effect only during the time that the premises are so used": See, also, Shaw v. Roberts, 6 Ad & E. 75; 1 Nev. & P. 279; Moore v. Protection Ins. Co., 31 Me. 223; Leggett v. Ætna Ins. Co., 10 Rich. (S. C.) 202. In Delaware, if the risk is changed or increased, and no notice thereof is given according to the requirements of the contract, the policy is forfeited: Lattomus v. Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 404. In a case in the supreme court of the United States (Imperial F. Ins. Co. v. Coos Co., 151 U. S. 452, 465; 14 Supr. Ct. Rep. 379), it was held that the alteration and repairs of the insured premises without conforming to the requirements of the policy in respect thereto avoided the contract, that the fact that the increase of risk did not continue to the time of the loss was immaterial, and that insurer was not responsible to assured for damage and injury to the insured premises after such repairs and alterations, although not happening in consequence of the repairs. The court, per Jackson, J., considers the case of Kyte v. Commercial Union Assur. Co., 149 Mass. 116, 122, quotes from the court therein, and follows the same. It also says: "The court below proceeded upon the theory that the fire having occurred after the employment of the mechanics had ceased, such employment and the making of the alterations and repairs described did not constitute a breach at the time of the fire; that the increased risk which was necessary to render the policy void must be found to have existed at the time of the fire, and not at any preceding date. In Ferrer v. Oxford F. & L. Ins. Co., 67 Pa. St. 373, the policy contained the provision that it should not 'be assignable without the consent of the company indorsed thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of said policy shall thenceforth cease.' The assured assigned the policy, and the court held that the condition was a perfectly legal one and that the company was not liable, although the plaintiff had redeemed the policy previously assigned and was the holder thereof at the time of the suit. In Moore v. Phœnix Ins. Co., 62 N. H. 240, the policy contained, among other provisions, the following conditions: 'If the above-mentioned premises shall become vacant or unoccupied for a period of more than ten

days without the assent of the company indorsed hereon, then and in every such case this policy shall be void.' At the time the premises were destroyed they were occupied, but for a period of at least three months prior to that time they were unoccupied, although without the knowledge of the insured or insurer. The court held that the condition of the policy had been broken by the unoccupancy of the premises, and that 'the contract once being terminated could not be revived without the consent of both the contracting parties. It is immaterial, then, whether the loss of the buildings is due to unoccupancy or to some other cause.' " It is held in New Hampshire that if there is a stipulation that the policy shall be avoided by the use of an article expressly named, and there is nothing in the policy from which a permission to use the article in a partial, limited, or temporary way can be inferred, full effect is usually given to the prohibitive clause by a forfeiture of the policy for its violation: Wheeler v. Traders' Ins. Co., 62 N. H. 450; 13 Am. St. Rep. 582. Again an increase of risk from means "within the control of the assured" refers to a permanent change purposely undertaken in the structure, use, or occupation of the premises, and not to a mere negligence of assured, as in case of a failure to repair a pump: Albion Lead Works v. Williamsburg City F. Ins. Co., 2 Fed. Rep. 479. The condition that "if the hazard be increased by any means within the control or knowledge of the insured" the policy will be void is intended obviously to protect the property during the life of the policy from fire by change in structure, methods of heating, addition of new outbuildings on the premises, and like means within assured's knowledge or control whereby the hazard might be increased: Collins v. London Assur. Co., 165 Pa. St. 298, 305; 30 Atl. Rep. 924. It is held in Wisconsin that if a clause in a policy provides that "it shall be void" upon the breach of a specified condition, the insurer's exemption from liability becomes absolutely fixed as soon as that condition is broken, and does not depend on whether he notifies or omits to notify the insured after such breach what action he intends to take in regard to the continuance or forfeiture of the policy: Carey v. German-American Ins. Co., 84 Wis. 80; 36 Am. St. Rep. 907. In a case before the United States supreme court the condition against increase of risk and against alteration occurring in the same clause are held, nevertheless, distinct. Thus it is declared that if a policy stipulates that it shall be void in case "mechanics are employed in building, altering, or repairing the premises" without notice to or permission of the insurer, it is not necessary to show that the alterations and repairs increased the risk, but the fact that they are made without the insurer's consent avoids the policy, even though the policy also provides against increase of risk, such condition being an independent stipulation: Imperial F. Ins. Co. v. Coos County, 151 U. S. 452; 14 Supr. Ct. Rep. 379. In Massachusetts, if a policy of insurance is conditioned to be void in case of any increase of risk, and the risk is increased in violation of such condition, it is held that the policy is avoided though the increase may be only temporary: Kyte v. Commercial Ins. Co., 149 Mass. 116; Lyman v. State Ins. Co., 14 Allen (Mass.), 329; Jennings v.

Chenango Co. Mut. Ins. Co., 2 Denio (N. Y.), 75; Mead v. North Western Ins. Co., 7 N. Y. 530. See sec. 2372, herein. In this case the court said: "An increase of risk which is substantial and which is continued for a considerable period of time is a direct and certain injury to the insurer and changes the basis upon which the contract of insurance rests; and since there is a provision that in case of an increase of risk which is consented to or known by the assured and not disclosed and the assent of the assurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk." In New York it has been held that such a use will avoid the policy: Mead v. North Western Ins. Co., 3 Seld. (N. Y.) 530; overruling Gates v. Madison Ins. Co., 1 Seld. (N. Y.) 469. In this case Welles, J., said: "It is recited by numerous decisions that if the warranty is violated it avoids the policy, and that it is immaterial whether the breach affects the risk or is connected with the loss or not. It would seem in theory that it was immaterial whether the act or thing to which the warranty related was continued up to the time of the loss or had been discontinued before. I incline to the opinion that the only safe rule is to hold the contract at an end the moment the warranty is broken, and that it cannot be revived again without the consent of both parties, unless the insurer has by some act waived the breach of the warranty." See, also, Insurance Co. v. Hughes, 10 Lea (Tenn.), 461; Gaty v. Phœnix Ins. Co., 30 Mo. 56; Glen v. Lewis, 8 Exch. 607; 22 L. J. Ex. 228; 17 Jur. 842. So in Minnesota a policy of fire insurance provided that if the insured buildings should be "altered, added to, or enlarged" due notice must be given and consent indorsed on the policy. A by-law, made part of the contract, provided that whenever a building should be "altered, enlarged, or appropriated to any other purposes than those mentioned, or the risk be otherwise increased," without the consent of the insurer first obtained, the policy should be void. Under these provisions in the policy, notice to the insurer and consent to a material enlargement of the building are required, although the risk be not in fact thereby increased. A written permission in such policy "to make necessary alterations and repairs" does not authorize a material enlargement of the building by an addition twelve feet wide and two hundred feet long: Frost's D. L. etc. Co. v. Millers' etc. Ins. Co., 37 Minn. 300; 5 Am. St. Rep. 846. Other cases bearing upon this point may be found throughout this chapter. We have not noted cases of deviation herein in marine risks, for they do not rest upon the principle of increase of risk, as appears from what has elsewhere been said. Such cases, therefore, are inapplicable. See c. 52, herein. *Opinions of text-writers.*—Mr. Wood is of opinion that "while it is true that the tendency of the cases, and perhaps justly, is to hold that the policy is only suspended, and not in fact vitiated, by the increase of risk during its continuance, and that it is revived as an operative instrument when such increase in the hazard ceases, yet it is not necessary that the loss should have resulted from such hazardous use": 1 Wood on Fire Insurance, 2d ed., 593. Mr. Biddle says: "It is submitted that logically

a recovery cannot be had on the policy if the risk be increased, though such increase may not exist at the loss. . . . . Though in certain courts, apparently, a temporary increase not existing at loss will not avoid. But in any event it has been held that a clause against an increase of risk within the control of the insured contemplates a permanent increase by an act of the insured, and will not apply to a mere act of negligence, as an omission to repair an airpump: 2 Biddle on Insurance, ed. 1893, 714. Mr. Ostrander, referring to the condition in reference to occupancy, says, substantially, that occupation at the time of the loss is sufficient, but adds: "This construction, while just, is somewhat strained and exceedingly liberal toward the insured. When the policy stipulates that it shall become void if the building insured is left without an occupant, it is not clearly apparent how the dead policy can be again restored to life without some affirmative act of the insurer. While it appears to us that this is the better legal view, it must be admitted that it is sustained by no equitable considerations": Ostrander on Fire Insurance, ed. 1892, p. 330, sec. 141. Mr. Griswold states this rule, which bears upon the subject: "The change in the occupancy of a building must be a permanent one; a mere temporary exercise therein of a more hazardous trade or vocation will not affect the validity of the policy, in the absence of specific stipulations against such temporary occupancy." He also says: "Where there are no express stipulations in the policy to the contrary, unauthorized use of the property after insurance, by which the hazard is increased, suspends the insurance during the continuance of such 'unauthorized use' ": Griswold's Fire Underwriters, ed. 1872, pp. 372, 373, secs. 1117, 1121. Mr. Parsons considers that the doctrine is doubtful that the policy may attach as soon as a ship becomes seaworthy, if the deficiency is temporary and easily remedied, but that if the policy has attached and there is a breach of this warranty, as in case of the master's neglect to repair in the first port, such breach may only suspend the liability; that the insurers are discharged for a loss from the unseaworthiness during such suspension, but not for a loss from other causes: 1 Parsons on Marine Insurance, ed. 1868, 377, 378, 381-83. This statement must, however, be considered in relation to the point whether the implied warranty of seaworthiness is extended beyond the commencement of the voyage. See c. 48, on seaworthiness, herein. Mr. Phillips' opinion has been noted in part under the quotation above given from Allen, J., in Hinckley v. Germania Ins. Co., 140 Mass. 38. There may, however, be added as pertinent the following general rule stated by that author, "namely, that the forfeiture is to be extended only far enough to put the other party, that is, the insurer in this case, in the same condition as he would have been had the stipulation been complied with. This rule will always operate in favor of the insurer and against the assured, but only commensurately with the noncompliance on the part of the latter": 1 Phillips on Insurance, 3d ed., p. 541, sec. 975.

CHAPTER L.

ALIENATION.

§ 2246. Alienation—Generally.
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§ 2294. Summary of decisions.
§ 2295. Conclusion.

§ 2246. Alienation — Generally. — Although a policy of fire insurance contains a provision avoiding it in case of alienation of the insured property, nevertheless it may be avoided, in the absence of any such clause, where at the time of loss the original insured has no interest in the subject matter of the insurance. The contract of fire insurance is a personal one, and does not run with the land. It is a contract to indemnify the person named in the policy against loss upon property in which he has an insurable interest, existing both at the time of the issuance of the policy and at the time of loss.[1] If assured parts with his insurable interest in the property, the contract is at an end. Where the policy forbids an alienation, it may be suspended or avoided in the absence of any prohibition. Therefore, an absolute assignment or sale of insured property after the insurance is made divests the

[1] Wilson v. Hill, 3 Met. (Mass.) 66; Lane v. Maine Mut. F. Ins. Co., 12 Me. 45; Cummings v. Cheshire Mut. F. Ins. Co., 55 N. H. 447; Lucena v. Crawford, 2 Bos. & P. N. R. 300.

insurable interest of the vendor, and creates a bar to the right of action on the policy, unless by some means its existence has been preserved for the benefit of the assignee.[2] If the policy contains no provision against alienation, the transfer of the entire interest in the property covered will not render the contract void, but simply inoperative during the period of suspension, and subject to a revival upon the insurable interest being again vested in the person named in the policy as insured.[3] The fact that a transfer or sale of the property insured is merely voidable will not aid the insured where it has not been set aside prior to the loss. Such a sale is held to be an alienation or sale within the meaning of the clause, and to avoid the policy.[4]

§ **2247. Conditions as to Alienation—Construction of.**—Conditions as to alienation and the like are not in most policies absolute, but are qualified in this, that the assurer's consent is required in case of alienation, etc. Where such qualifying clause is inserted, however, it is held that the effect is not to render the policy absolutely void, but only voidable at the option of the company.[5] A merely nominal change of interest will not, it is held, avoid a policy containing a provision against any sale, transfer, or change of title in the property insured; but a transfer which increases the temptation on the part of the insured to defraud the underwriter or lessen assured's interest in preventing a destruction of the property will avoid the contract. The insured must be divested of all insurable interest in the property by the transfer.[6] If the policy enumerates changes of title which will render it void, only such changes as are enumerated will invalidate it,

[2] Morrison v. Tennessee etc. Ins. Co., 18 Mo. 262; 59 Am. Dec. 299.

[3] Home Ins. Co. v. Hauslein, 60 Ill. 521; 1 Ins. L. J. 818; Mount Vernon Mfg. Co. v. Summit etc. Ins. Co., 10 Ohio St. 347. See, also, sec. 903, herein.

[4] Worthington v. Bearse, 12 Allen (Mass.), 382. See, also, Lane v. Maine Ins. Co., 13 Me. 44; Cooper v. Hudson River Ins. Co., 17 N. Y. 424.

[5] Grant v. Elliot & M. F. Ins. Co., 75 Me. 196.

[6] Ayres v. Hartford Ins. Co., 17 Iowa, 176; 85 Am. Dec. 553. In this case the court said: "If the real ownership remains the same, if there is no change in the fact of title, but only in the evidence of it,

provided the insured does not alienate his entire interest in the property insured, and if the alienation is not a change specified in the policy, and is not entire, the insured may recover for such interest as he suffers damage for in case of loss.[7] A stipulation avoiding the policy, if any change takes place in the title, interest, location, or possession of the property without consent of the company indorsed on the policy, applies only to such changes as arise after the delivery of the policy in the ownership of the property, and not to an existing state or condition of the property at the time the policy was issued, except as material facts were misstated or concealed.[8] A policy conditioned to be void in case of change of title is not avoided by the payment of the mortgage and the assignment of the policy to the owner with the company's consent indorsed thereon.[9] A clause forbidding "change of title or possession" is held to refer to the right of possession, and not to the occupancy of the insured property.[10] So it is held that the letting of an insured house to tenants is not a change of possession within the meaning of the clause.[11] Conditions against alienations, clearly expressed, in policies of insurance, must, however, be strictly construed, the court having in view the object of the insurance company in inserting them.[12] Many forms of these clauses in regard to alienation are inserted in policies. Though they may be in substance the same, yet there is much difference in the particular wording of these conditions. Many of the policies enumerate changes in title which will avoid them, while others contain stipulations against change of title framed in general terms of prohibition.[13] In all cases

and if this latter change is merely nominal and not of a nature calculated to increase the motive to burn, or diminish the motive to guard, the property from loss by fire, the policy is not vitiated."

[7] Judge v. Connecticut Ins. Co., 132 Mass. 521.

[8] Hoose v. Prescott Ins. Co., 87 Mich. 309; 11 L. R. Annot. 340; 32 Cent. L. J. 226; 47 N. W. Rep. 587.

[9] Kimball v. Monarch Ins. Co., 70 Iowa, 513; 30 N. W. Rep. 862.

[10] Poole v. Hudson Ins. Co., 2 Fed. Rep. 432; 9 Ins. L. J. 428.

[11] Rumsey v. Phœnix Ins. Co., 17 Blatchf. (C. C.) 527.

[12] So held in Commercial Union Assur. Co. v. Scammon, 126 Ill. 355; 9 Am. St. Rep. 607.

[13] The clause in the New York standard fire policy provides that it shall be void "if the subject of the insurance be personal property,

where the policy contains a condition as to alienation, the exact language of such condition must be carefully examined in order to ascertain the intent of the parties and their rights under the contract.

§ 2248. Consent to Assignment—What Constitutes a Waiver—Notice to Company.—If the insurer consents to the transfer or the sale of the property and the assignment of the policy, this will constitute a valid confirmation, so that the vendee may recover upon the policy. It is not necessary that the consent be given before the sale of the property, as a recognition of the policy by the insurer as a valid instrument, after knowledge of a breach of a condition in the policy as to a sale or transfer of the insured premises, binds the insurer and renders the policy valid and operative.[14] Where a policy contains a condition that it shall become void if the property "shall be sold or conveyed," and it is taken upon mortgaged property, after which it is assigned to, and the property delivered to, the mortgagee with the consent of the company, such transfer of the possession and control of the property is not of itself such sale and conveyance as will invalidate the policy.[15] If a company has given its consent to a sale of insured property, it has been held by such act to have also assented to the terms of the sale.[16] The words "payable in case of loss to" a certain designated person indorsed on the policy by the insured, where it provided that a sale of the

and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of any sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise."

[14] Gilliat v. Pawtucket Ins. Co., 8 R. I. 282; 91 Am. Dec. 229; Illinois F. Ins. Co. v. Stanton, 57 Ill. 354; Grant v. Eliot Ins. Co., 75 Me. 176; Sanders v. Hillsborough Ins. Co., 44 N. H. 238; Buchanan v. Exchange F. Ins. Co., 61 N. Y. 26. But see Davis v. German-American Ins. Co., 135 Mass. 251.

[15] Washington Ins. Co. v. Hayes, 17 Ohio St. 432; 93 Am. Dec. 628.

[16] Farmers' Ins. Co. v. Ashton, 31 Ohio St. 477.

premises without the consent of the insured indorsed on the policy should avoid it, are not notice of a sale of the property to the insurer, to whom the insured forwarded the policy after making their indorsement thereon, and in such a case the words written under the foregoing by the insurer, "consent is hereby given to the above indorsement," is not a consent to the sale of the property, since this indorsement does not imply that the insurer had any knowledge of the sale or intended to consent to it. It is a mere transfer of the right to collect the amount, which may be done under the policy in case of loss.[17] Where the policy required that the insured give the insurers notice of any mortgage made on the property, it was held that the insured was bound to give actual notice, and the sending of notice by mail was insufficient, unless it was actually received by the company.[18] If it is stipulated that assent of the company must be indorsed in writing on the policy before transfer of the property is made, or the policy shall be void, a waiver by the company of such provision, in order to be effective, must be an intentional one; a mere notice of the transfer to the company, or a failure by the company to notify the insured of its disapproval, is not a sufficient waiver.[19] In order to recover in such a case, the insured must show some actual waiver of the condition requiring written consent, or else a parol consent.[20] Where a company which had issued a policy reinsured in another company, and the policy of reinsurance provided that in case of a change of title the policy should be void, but further provided, by a rider attached to a policy, that the reinsurance was subject to such risks, conditions and assignment as might be assumed by the reinsured, it

[17] Bates v. Equitable Ins. Co., 10 Wall. (U. S.) 33. Examine Batchellor v. People's F. Ins. Co., 40 Conn. 56.

[18] Plath v. Minnesota Farmers' Mut. Ins. Co., 23 Minn. 479; 23 Am. Rep. 697. But see secs. 1163, 1279, 1335, 1336, and c. 68, herein.

[19] Armstrong v. Agricultural Ins. Co., 130 N. Y. 560; 42 N. Y. St. Rep. 555; 29 N. E. Rep. 991; 21 Ins. L. J. 431; Gibbs v. Richmond Co. M. Ins. Co., 9 Daly (N. Y.), 203; Girard F. & M. Ins. Co. v. Hebard, 95 Pa. St. 45.

[20] Lett v. Guardian Ins. Co., 125 N. Y. 82; 34 N. Y. St. Rep. 411; 20 Ins. L. J. 176; 25 N. E. Rep. 1088.

was held that a consent to a transfer given by the company originally insuring was binding upon the reinsurers.[21]

§ **2249. Void Sale of Insured Property.**—A void sale of the insured property will not avoid the policy, although it contains a clause forbidding alienation or change of title. Such sale does not operate as a change or transfer of title in any way, and is in no way an alienation of the property. The insured stands in the same position, in respect to his rights against the insurer, as before the sale.[22] So where a husband alone executes a deed of property, which is void because without the wife's signature, it is held that no rights are forfeited under the policy.[23] And where a deed of trust was given, which was void, and consequently rendered a subsequent sale and deed of the property by the trustee thereunder void, it was held that there was no transfer of the interest of the insured, and that the policy was not vitiated.[24] Nor under such clause is the policy avoided by the insured's giving a deed of the property which is invalid owing to the fact that the grantor is incompetent to make such a deed.[25] In Kansas, the conveyance of a homestead made by a husband alone, and which is therefore void, cannot affect the policy.[26]

§ **2250. Voidable and Set-aside Sale no Alienation.**—Where one clause of a condition in a policy on premises provides that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal pro-

[21] Manufacturers' F. & M. Ins. Co. v. Western Assur Co., 145 Mass. 419; 14 N. E. Rep. 632.

[22] Jackson v. Ætna Ins. Co. 16 B. Mon. (Ky.) 242; Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; School District v. Ætna Ins. Co., 62 Me. 330; Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.

[23] German Ins. Co. v. York, 48 Kan. 488; 30 Am. St. Rep. 313; 29 Pac. Rep. 586. See, also, Commercial Ins. Co. v. Spanknable, 52 Ill. 53.

[24] Commercial Union Ins. Co. v. Scammon, 133 Ill. 627; 12 N. E. Rep. 324; 6 Ill. App. 551.

[25] Gerling v. Agricultural Ins. Co., 39 W. Va. 689; 20 S. E. Rep. 691; 24 Ins. L. J. 385.

[26] German Ins. Co. v. York, 48 Kan. 488; 30 Am. St. Rep. 313.

cess or judicial decree, or voluntary transfer or conveyance . . . . in every such case this policy shall be void," and another clause provides that "when property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate," the latter clause will be held to have been intended to explain and qualify the meaning of the words of the former, and the sale or disposition of the property intended will be construed to be such as caused all interest of the assured in or control over the property to cease. And in such case a sale of the property insured which is voidable and is afterward set aside is not such an alienation as will avoid the policy.[27]

§ **2251. Sale of Part of Subject of Insurance where Policy Contains no Condition as to Alienation.**—If the policy contains no condition avoiding it in case of the alienation of the insured property, it has generally been held that an alienation which does not divest the insured of his entire interest in the property will not render the policy void as to the interest retained by him. The assured must have parted with his entire interest in the policy in order to render it inoperative. If he retains any interest thereunder, of which he is possessed at the time of loss, he may recover to the extent of that interest.[28]

[27] In this case a trust deed was made of property to secure a debt. Afterward, the maker of the deed effected insurance upon the same property under the clauses above noted, and the trustee, without his consent and against his protest, sold the property to the cestui que trust, the maker of the trust deed being in possession and so remaining until after the sale, and until the property was destroyed by fire, denying the validity of the sale and asserting his right to possession and ownership, and within a reasonable time instituted proceedings to set the sale aside. The relief asked was granted. Commercial Union Assur. Co. v. Scammon, 126 Ill. 355; 9 Am. St. Rep. 607.

[28] Ayres v. Home Ins. Co., 21 Iowa, 185; Lazarus v. Insurance Co., 5 Pick. (Mass.) 75; Jackson v. Massachusetts Ins. Co., 23 Pick (Mass.) 418; Folsom v. Belknap Ins. Co., 30 N. H. 231; Masters v. Madison Ins. Co., 11 Barb. (N. Y.) 624; Norcross v. Insurance Co., 17 Pa. St. 429; Shooks v. Marshall, 2 Bing. (N. C.) 761; Rice v. Provincial Ins. Co., 7 U. C. P. C. 548.

§ 2252. Sale of Property Insured where Policy Stipulates against Alienation or Transfer of Subject of Insurance.—If the policy in express terms prohibits an alienation or transfer in any way, either in whole or in part, of the interest of the insured in the property, such condition will prevent an alienation of a part of the insured's interest thereunder. But the policy may stipulate only that it shall be void in case of the "alienation or transfer of the property insured." Under a clause of this nature it is held that an alienation of a part of the property insured will not invalidate the policy so long as the insured retains an interest in the property, and in such a case he may recover to the extent of the interest remaining in him.[29] So where the policy provided that if the insured should make any other insurance on the property, or any part thereof, or if the property should be sold or transferred, or any change should take place in the title or possession thereof without the company's consent, the policy should be void, and that when the property had been sold or otherwise disposed of, so that all the interest on the part of the insured had ceased, the insurance on such property should terminate, it was held that the insurance on the entire property was not by these provisions forfeited by a sale of a portion of the property.[30] In another case however, where a part of the property had been sold, it was held that such a sale would avoid the policy, unless it could be said as a matter of law that the remaining risk was not thereby increased.[31]

§ 2253. Alienation of Part where Contract Severable. Where a policy covers different classes of property, describ-

[29] Commercial Ins. Co. v. Spanknable, 52 Ill. 53; Ayres v. Home Ins. Co., 21 Iowa, 185; Cowan v. State Ins. Co., 40 Iowa, 551; McCarty v. Connecticut Ins. Co., 17 La. 365; Citizens' Ins. Co. v. Dall, 35 Md. 89; Lazarus v. Commercial Ins. Co., 5 Pick. (Mass.) 76; Stetson v. Massachusets Ins. Co., 4 Mass. 330; Manley v. Insurance Co. of North America, 1 Lans. (N. Y.) 120; Courtney v. New York Ins. Co., 28 Barb. (N. Y.) 116; Tyler v. Ætna Ins. Co., 12 Wend. (N. Y.) 507; Blackwell v. Miami Valley Ins. Co., 48 Ohio St. 533; 29 N. E. Rep. 278; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Scanlon v. Union F. Ins. Co., 4 Biss. (C. C.) 511.

[30] Quarrier v. Peabody Ins. Co., 10 W. Va. 507; 27 Am. Rep. 582.

[31] Baldwin v. Hartford F. Ins. Co., 60 N. H. 422; 49 Am. Rep. 324 (one judge dissenting).

ing each class separately or different items of the same class, and specifying a distinct and separate sum on each, the policy is generally held, in case of an alienation of a part of the property insured, to be only inoperative as to that part.[32] So an alienation of one of two houses insured in the same policy, but valued and insured separately, avoids the policy only as to the house so alienated, where the charter of the company provides that "the alienation of any property" shall avoid the "policy thereon."[33] A policy upon personal property, though the items are not specifically named, may also come within the same rule. So where a policy was issued upon all the personal property of the insured without specifically naming it, an alienation or transfer of a part thereof was held not to avoid the whole contract, but only to affect the particular property alienated.[34]

§ 2254. Alienation of Part—Whether Contract Entire or Severable.—There is another class of cases in addition to the foregoing in which it is held that if the contract is entire, then an alienation as to part of the property insured will invalidate the policy. In some of these cases the question as to whether the contract is entire or not has been held dependent upon the manner in which the premium has been paid, and that if the premium is single and entire, then the policy will be avoided by a sale of a part of the property, notwithstanding the insurance is distributed among several items in the policy.[35] But it would seem that other facts are to be considered, in determining the entirety of the contract, in addition to the pre-

[32] Commercial Ins. Co. v. Spanknable, 52 Ill. 53; Hartford F. Ins. Co. v. Walsh, 54 Ill. 165; German Ins. Co. v. Fairbank, 32 Neb. 750; 49 N. W. Rep. 711; State Ins. Co. v. Schreck, 27 Neb. 527; 6 L. R. Annot. 524; 43 N. W. Rep. 340; Bodle v. Chenango Mut. Ins. Co., 2 Comst. (N. Y.) 53.

[33] Clark v. New England etc. Ins. Co., 6 Cush. (Mass.) 342; 53 Am. Dec. 44.

[34] State Ins. Co. v. Schreck, 27 Neb. 527; 6 L. R. Annot. 524; 43 N. W. Rep. 340.

[35] Plath v. Minnesota Farmers' M. F. Ins. Co., 23 Minn. 475. See, also, Lovejoy v. Augusta Ins. Co., 45 Me. 417; Barnes v. Union M. F. Ins. Co., 51 Me. 110; Brown v. People's Mut. Ins. Co., 11 Cush. (Mass.) 280; Kimball v. Howard F. Ins. Co., 8 Gray (Mass.), 33 Gattsman v. Pennsylvania Ins. Co., 56 Pa. St. 210. See sec. 1931, herein.

mium.[36] In Loomis v. Rockford Insurance Company,[37] three houses and their contents, situate on different farms, were insured, each for a separate amount, by a policy stating the premium as a gross sum, and the contract was held divisible, and that if there was a breach of condition as to one of the houses, by its conveyance without the assent of the insurer, the policy was not thereby avoided as to the other houses, and it was declared that a recovery should be had in all those cases where the contract is divisible and the different properties are insured for separate sums, and the risk upon some of the property is not affected by the clause which renders the policy void in part; that although insurance is distributed to the different items of insured property, the contract is indivisible if its breach as to one item of the property affects, or may reasonably be supposed to affect, the other items, by increasing the risk thereon.

§ 2255. **Conclusion—Alienation of Part of Subject of Insurance.**—From a consideration of the cases upon this subject, as in all other cases of contract, the intent of the parties must control. In order, therefore, to deduce any definite rule the exact conditions of the contract as to alienation must be carefully examined in connection with the entire contract to ascertain whether there exists an intent that the contract should be entire, and if it is obvious that it was intended that an alienation of a part of the property insured

[36] In McGowan v. Insurance Co., 54 Vt. 211, the court said: "This is a question of great importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but we think are easily reconciled by referring to the plain principles which should govern them. The general rule, 'void in part, void in toto,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud or some unlawful act condemned by public policy or the common law; cases where the contract is entire and not divisible, and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract . . . . a recovery should be had in all those cases where the contract is divisible to different properties insured for separate sums, and the risk unaffected by the cause that renders the policy void in part."

[37] 77 Wis. 87; 20 Am. St. Rep. 96; 45 N. W. Rep. 813.

should avoid the entire contract, then such intention will prevail. If, however, no such intention can be gathered from the terms of the contract, coupled with such surrounding circumstances as the rules of evidence permit to be shown, then it would seem that though a part of the subject of insurance has been alienated, the contract will still be operative as to that part remaining where by such alienation the insurer has suffered no damage, and the risk which he has assumed has been in no way increased thereby.[38]

§ **2256. Changes by Encumbrances on Property.**—A condition in a policy that it shall be void, unless consent in writing is indorsed thereon by the company, if the assured is not the sole and unconditional owner of the property, relates only to changes arising after the execution and acceptance of the policy, and does not apply to an existing state or condition of the property at the time of the issuance of the policy.[39] A covenant avoiding the policy if the property insured shall become encumbered by mortgage, judgment, or otherwise without the company's consent, is broken, when an encumbrance falls upon the property, whether with or without the actual knowledge of the insured.[40] A condition against increase of encumbrances on the insured property without notice thereof to the company is not violated by a change, but not an increase, of encumbrances known to the company at the time the insurance was effected.[41] So when the insured, when applying for the insurance, informs the insurer of the amount of encumbrances then existing upon the

[38] Merrill v. Agriculture Ins. Co., 73 N. Y. 452. See, also, Insurance Co. v. Cornick, 24 Ill. 455; Insurance Co. v. Walsh, 54 Ill. 164; Insurance Co. v. Lawrence, 4 Met. (Ky.) 9; Clark v. Insurance Co., 6 Cush. (Mass.) 342; Schmnitsch v. Russian Ins. Co., 9 Ins. L. J. 60; Date v. Lawrence Ins. Co., 14 U. C. C. P. 549. Under the code of California it is provided that a change of interest in one or more several distinct things, separately insured by one policy, does not avoid the insurance as to the others: Deering's Annot. Civ. Code Cal., 2555.

[39] So held in Hall v. Niagara F. Ins. Co., 93 Mich. 184; 32 Am. St. Rep. 497.

[40] Hench v. Agricultural Ins. Co., 122 Pa. St. 128; 9 Am. St. Rep. 74.

[41] Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553; 15 Am. St. Rep. 696.

property, and the latter issues the policy with knowledge of such encumbrances, the conditions against encumbrances is not violated if their amount never subsequently exceeds the amount stated.[42]

§ 2257. Meaning of Clause "Encumbrance in Any Way"—Liens Created by Operation of Law.—Many policies stipulate that in case of an "encumbrance in any way" upon the insured property the policy shall be void. In the absence of any further provision it has been held that liens, whether by judgment or otherwise, when created by operation of the law are not within the meaning of this condition, since the plain intent of the parties is only to prevent voluntary encumbrances. To construe it as extending to and including encumbrances created by operation of the law and in invitum, would defeat the contract of insurance in many cases where it would be contrary to the intention of the parties.[43] Where a policy stipulates that "if the property shall hereafter become mortgaged or encumbered this policy shall become null and void," such provision will be regarded as relating only to liens voluntarily placed upon the property by the assured, and not as applying to judgments or other liens created by law.[44] In an Iowa case, however, the contract stipulated that "when the property insured shall become alienated the policy thereon shall become void unless assigned by the consent of the president and secretary to the alienee"; the property was sold under a decree of foreclosure, and a decree was had to correct a mistake in the description in the mortgage. The time of redemption had also expired. The defense of a breach of the above condition was set up, it being averred that the property was alienated by operation of law, and that there was no assignment to the alienee, and it was held that the policy was avoided.[45]

[42] Gould v. Dwelling-House Ins. Co., 134 Pa. St. 570; 19 Am. St. Rep. 717.

[43] Bailey v. Homestead Ins. Co., 80 N. Y. 21; 16 Hun (N. Y.), 523; 36 Am. Rep. 570.

[44] Phœnix Ins. Co. v. Pickel, 119 Ind. 155; 12 Am. St. Rep. 393.

[45] McKissick v. Mill Owners' Mut. F. Ins. Co., 50 Iowa, 116.

§ **2258. Lease of Insured Property.**—The giving of a lease of insured property is not an alienation or transfer, and will not avoid the policy, unless it is prohibited by the terms thereof.[46] The fact that a lessee is in possession of property under a contract of purchase will not avoid a policy of insurance thereon which provides that "if the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer, or conveyance," the policy shall be void. The clause in regard to possession is construed as meaning not the occupancy of the property, but the possessory right. In such a case the possession of the lessee is considered as that of the insured.[47] So where insured property was leased for five years, the lessee having the privilege of buying the property for a specified sum at any time during said term, it was held that this would not avoid the policy, as the owner had not parted with his interest in the property, since the lessees had not purchased it.[48]

§ **2259. Conveyance by Deed of Property as Collateral.**—Under a condition in the policy that in case of any sale, transfer, or change of title in the property insured such insurance shall be void and cease, it has been held that a merely nominal transfer as collateral security for debts which are liens on the property will not avoid the policy.[49] In a case in the federal courts, where the condition in the policy was, "If the property be sold or transferred, or any change takes place in title or possession, the policy shall be void," it was held that a deed pledging the property as security for a debt, the debtor retaining possession and control of the property, did not invalidate the policy in the absence of any precise provision for-

[46] Lane v. Marine & F. Ins. Co., 12 Me. 44; 28 Am. Dec. 150.

[47] Rumsey v. Phœnix Ins. Co., 1 Fed. Rep. 396; 2 Fed. Rep. 429. See, also, Smith v. Phœnix Ins. Co., 91 Cal. 323; 27 Pac. Rep. 728; 33 Cent. L. J. 397; reversing 23 Pac. Rep. 383. But see Fire Assn. etc. v. Flourney, 84 Tex. 632.

[48] Farmers' Mut. Ins. Co. v. Rowland, 66 Md. 236; 7 Atl. Rep. 257.

[49] Ayres v. Hartford Ins. Co., 17 Iowa, 176; 85 Am. Dec. 553; Virginia Ins. Co. v. Feagan, 62 Ga. 515. But see Western Mass. Ins. Co. v. Riker, 10 Mich. 279.

bidding a transaction of that nature.[50] Though the insured may give a deed of the property covered by the policy which is absolute in its terms, it has been held that if given as security for a debt, the insured retaining possession, it will only be considered as a mortgage and no alienation.[51] And such seems to be the rule under the alienation clause of the New York standard fire policies.[52] Under a policy containing a clause prohibiting "any transfer of the interest of the insured, by sale or otherwise," without the consent of the insurer, a deed assigning a constructive possession of the insured goods to certain parties in trust for the benefit of creditors does not terminate the interest of the insured nor avoid the policy.[53]

§ 2260. Sale of Insured Property with Mortgage Back —Change of Interest or Title.—If the policy stipulates that if the property insured be sold or transferred, or any change takes place in title or possession, without the consent of the insurers, the policy shall be void, a sale or conveyance of the property without the required consent avoids the policy, although simultaneously therewith a mortgage is executed back by the purchaser for a part of the purchase money.[54] And this seems to be the rule in all cases where the policy provides that it shall be void in case of a "change of interest." In the earlier New York cases it was held that such a transfer with mortgage back did not avoid the policy.[55] But the decision in Savage v. Howard Insurance Company[56] established a different rule.

[50] Nusbaum v. Northern Ins. Co., 37 Fed. Rep. 524; 1 L. R. Annot. 704.

[51] Holbrook v. American Ins. Co., 1 Curt. (C. C.) 192.

[52] Barry v. Hamburg-Bremen F. Ins. Co., 110 N. Y. 1; 17 N. E. Rep. 405.

[53] Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; 81 Am. Dec. 521.

[54] Savage v. Howard Ins. Co., 52 N. Y. 502; 11 Am. Rep. 741. See, also, Home Mut. F. Ins. Co. v. Hauslein, 60 Ill. 521; Miner v. Judson, 5 Thomp. & C. (N. Y.) 46; 2 Hun (N. Y.), 441; Burger v. Farmers' Mut. F. Ins. Co., 71 Pa. St. 422.

[55] Kitts v. Massasoit Ins. Co., 56 Barb. (N. Y.) 177; Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68; Fernandez v. Great Western Ins. Co., 3 Rob. (N. Y.) 457.

[56] 52 N. Y. 502; 11 Am. Rep. 741. Here the court said: "The condition is not capable of two readings, and the courts have no right,

§ **2261. Sale and Mortgage Back where Policy Prohibits Alienation of Interest.**—A different rule from that stated under the last section seems to prevail where the policy simply stipulates that an alienation of the interest of the insured shall avoid the policy.[57] The sale and mortgage back in these cases constitute one act, it is said, and though it is a change of title and interest, it is not an alienation, since the insured has an interest in the property. The interest is simply changed from an absolute to a defeasible one.[58]

§ **2262. Deed and Reconveyance in Trust to Secure Payment of Purchase Money.**—An insured who has conveyed insured property retains an insurable interest, and may recover his actual loss, not exceeding the amount insured, when the grantee at the time of the conveyance reconveys the property to a third person, as trustee for the insured, to secure the payment of the purchase money.[59]

§ **2263. Trustee, Purchaser at His Own Sale under Power of Sale in Mortgage—No Alienation.**—A trustee un-

under the pretense of interpretation, to nullify a material provision inserted for the reasonable protection of the insurers, and thus exercise a dispensing power in favor of the insured. It cannot be said that a conveyance of the fee and the taking back of a mortgage for the purchase money is not as well a sale or transfer or a change of title. It is sufficient to put an end to the policy that there has been a change of title, and no one can say that a conveyance of the fee and substituting the interest of a mortgagee in the assured is not a substantial change in the title. The fact that, to preserve equities and exclude liens which might otherwise defeat purchase money liens, courts regard a deed of conveyance and purchase money mortgage as simultaneous, and the rights of the parties as if the title to the amount of the mortgage interest had never passed out of the grantor, does not aid in construing this contract, or tend to establish the claim of the respondent that there has been no transfer of the property." The policy in this case contained the following condition: "If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, without the consent of the company indorsed hereon, the policy shall be void."

[57] Stetson v. Massachusetts Ins. Co., 4 Mass. 336; Howard Ins. Co. v. Bruner, 23 Pa. St. 50.

[58] Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68. But see Tittemore v. Vermont Mut. Ins. Co., 20 Vt. 546.

[59] Morrison v. Tennessee etc. Ins. Co., 18 Mo. 262; 59 Am. Dec. 299.

der a mortgage containing a power of sale cannot become purchaser at his own sale, either directly or indirectly, and if he does so become the purchaser, the rights of the mortgagor will remain precisely the same as though no sale had been made, and such a sale will not constitute an alienation within the meaning of a clause against alienation in an insurance policy.[60]

§ **2264. Mortgage not Alienation, Sale, or Transfer of Title.**—A condition imposing a forfeiture is, as we have stated, construed strictly. Therefore, unless the policy by its terms indicates the intention that a mortgage will invalidate the policy, it will not so operate. The word "alienation" is construed as meaning a conveyance of one's entire estate. Consequently, a provision in a policy avoiding it in case of "alienation by sale or otherwise" does not apply to a conveyance by way of mortgage while the mortgagor remains in possession and there has been no entry for foreclosure,[61] and a mortgage is not a violation of a clause in the policy against the sale, conveyance, alienation, or transfer of the property.[62] A conveyance of the subject matter of a policy does not bar recovery by insured to the extent of his actual loss, provided it does not exceed the sum insured, if the conveyance be in the nature of a mortgage, or in trust with a resulting trust to the insured.[63] After effecting insurance the insured cannot

[60] Commercial Union Assur. Co. v. Scammon, 126 Ill. 355; 9 Am. St. Rep. 607.

[61] Jackson v. Massachusetts Mut. F. Ins. Co., 23 Pick. (Mass.) 418; 34 Am. Dec. 69. See, also, Aurora F. Ins. Co. v. Eddy, 55 Ill. 213; Eddy v. Hawkeye Ins. Co., 70 Iowa, 472; 39 N. W. Rep. 808; Pollard v. Somerset F. Ins. Co., 42 Me. 221; Bryan v. Traders' Ins. Co., 145 Mass. 389; 5 N. E. Rep. 457; Judge v. Com. Ins. Co., 132 Mass. 521; Folsom v. Belknap Co. M. F. Ins. Co., 30 N. H. (Fost.) 231; Lossman v. Pimlico Banking etc. Co., 78 N. C. 145; Shepard v. Union M. F. Ins. Co., 38 N. H. 282; Conover v. Marine F. Ins. Co., 3 Denio (N. Y.). 254; 1 Comst. (N. Y.) 290; Allen v. Hudson River etc. Ins. Co., 19 Barb. (N. Y.) 442; Byers v. Farmers' Ins. Co., 35 Ohio St. 606; Holbrook v. American Ins. Co., 1 Curt. (C. C.) 193; Freizen v. Allemania F. Ins. Co., 30 Fed. Rep. 352. But see McCullogh v. Indiana Mut. Ins. Co., 8 Blatchf. (C. C.) 50.

[62] Commercial Ins. Co. v. Spankuable, 52 Ill. 53; 4 Am. Rep. 582. See, also, Quarier v. Peabody Ins. Co., 10 W. Va. 507; 27 Am. Rep. 582.

[63] Morrison v. Tennessee etc. Ins. Co., 18 Mo. 262; 59 Am. Dec. 299.

escape liability for the premium by executing a mortgage upon the property, notwithstanding the policy is conditioned to be void if the title is transferred without the consent of the company, for giving a mortgage does not change or transfer the title.[64]

§ **2265. When Mortgage not Encumbrance.**—The renewal of mortgage existing on property at the time it is insured does not vitiate the policy, nor cause a breach of its condition against future encumbrances during the term of the policy and before loss without notice to and the consent of the company.[65] A mortgage paid but not discharged is not an encumbrance within the meaning of an insurance contract.[66]

§ **2266. Mortgage under Different Conditions in Different Policies.**—If a policy provides that it shall be void by alienation or sale in whole or in part of the insured property, it has been held that a mortgage is within the prohibition.[67] If there is a stipulation against "alienation or mortgage," a mortgage will avoid the policy,[68] though where the policy provided that "if the property shall hereafter become mortgaged or encumbered this policy shall be null and void," it was held that a mortgage of a part of the property would not defeat the policy, as the words "the property" meant the entire property covered by the policy.[69] If an insurance policy on real and personal property is conditioned to be void if the property shall be mortgaged, and the real estate is mortgaged, the policy is void unless the properties are insured for separate sums, and the risk on the personalty is not affected by the mort-

[64] Hanford Steam Boiler etc. Co. v. Lasher Stocking Co., 66 Vt. 439; 44 Am. St. Rep. 859.

[65] Kansas Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486; 39 Am. St. Rep. 356.

[66] Smith v. Niagara F. Ins. Co., 60 Vt. 682; 6 Am. St. Rep. 144.

[67] Abbott v. Hampden Mut. F. Ins. Co., 30 Me. 414.

[68] Appleton v. Phœnix Ins. Co., 109 Mass. 32.

[69] Phenix Ins. Co. of Brooklyn v. Lorenz, 7 Ind. App. 266; 29 N. E. Rep. 604.

gage.[70] A mortgage will also come within the clause rendering the policy void in case of "any encumbrances,"[71] Under such a clause it has been held that only voluntary encumbrances are meant, and not such encumbrances as tax liens or judgments.[72] Where the policy contains the provision that an "alienation by mortgage sale or otherwise" will avoid the policy, it has been held that the mortgage will not avoid it until the title has been entirely divested by foreclosure proceedings;[73] and the same is true where the policy stipulates against any change of title by sale, mortgage, or otherwise.[74] Where one holding the legal title to a vessel mortgages her for repairs, and advances upon her, given without knowledge or consent of her equitable owner, and in good faith by the mortgagee, without notice of any limitation of the mortgagor's right and authority, a policy of insurance conditioned to be void in case it or the interest insured by it should be sold, assigned, transferred, or pledged without previous consent of the insurers, it will be held void.[75] The giving of a deed of insured property by the owner to a third person, who gives back a defeasance, has been held to constitute a mortgage, and, as such, is not an alienation.[76] If, however, there has been a failure to record the defeasance, the giving of the deed by the insured will avoid the policy.[77] The fact that a fire policy is made payable to a third person, who is mortgagee, as his or her "interest may appear" does not render such third party the insured, and, therefore, if the mortgagor subsequently sells the property to the mortgagee, without notice to the com-

[70] McGowan v. People's Mut. F. Ins. Co., 54 Vt. 211; 41 Am. Rep. 843. See 38 Am. Rep. 228; 29 Am. Rep. 184; 26 Am. Rep. 373. See, also, German Ins. Co. v. Fairbank, 32 Neb. 750; 49 N. W. Rep. 711.

[71] Edes v. Hamilton etc. Ins. Co., 3 Allen (Mass.), 362; Hawkins v. Rockford Ins. Co., 35 N. W. Rep. 34.

[72] Hosford v. Hartford F. Ins. Co., 127 U. S. 404; Baley v. Homestead F. Ins. Co., 80 N. Y. 21; 36 Am. Rep. 570. But see Hicks v. Farmers' Ins. Co., 71 Iowa, 119; 32 N. W. Rep. 201.

[73] Atherton v. Phœnix Ins. Co., 109 Mass. 32.

[74] Shepard v. Minor etc. Ins. Co., 38 N. H. 232.

[75] Atherton v. Phœnix Ins. Co., 109 Mass. 32.

[76] Smith v. Monmouth M. F. Ins. Co., 50 Me. 96.

[77] Smith v. Monmouth M. F. Ins. Co., 50 Me. 96; Tomlinson v. Monmouth M. F. Ins. Co., 47 Me. 232.

pany or its consent, this will be in violation of the condition forbidding any change in the title or possession of the subject of insurance, and will render the policy void, both as to the mortgagor and mortgagee.[78]

§ **2267. Mortgage and "Alteration."**—A policy may prohibit any alteration in the title or ownership. Where a clause of this nature is inserted, it has been held that a mortgage will constitute an alteration within the meaning of the clause.[79] So where a policy provided that "all alienations and alterations in the ownership, situation, or state of the property, ... in any material particular, shall make void the policy," it was held that a mortgage would come within the prohibition, it being an alteration, in that it changed the ownership from a legal title to an equitable one.[80]

§ **2268. Chattel Mortgage under Alienation Clause.** The general principles stated in the preceding sections as to mortgages and their effect upon the policy are much the same in the case of a chattel mortgage. The exact language of the conditions must be carefully considered and construed. A chattel mortgage given upon insured personal property will not avoid a policy containing a provision that the policy shall be void "if any change takes place in title or possession," [81] provided the insured does not part with the possession of the property insured.[82] It is held to stand upon the same grounds as the mortgage of the realty, until the insured parts with the possession of the property.[83] Under a Canada decision, giv-

[78] Scania Ins. Co. v. Johnson (Colo. 1896), 45 Pac. Rep. 431.

[79] Hutchins v. Cleveland etc. Ins. Co., 11 Ohio St. 477.

[80] Edmunds v. Mutual Safety Ins. Co., 1 Allen (Mass.), 311.

[81] Taylor v. Merchants and Bankers' Ins. Co., 78 Iowa, 117; 49 N. W. Rep. 994; Hanover F. Ins. Co. v. Connor, 20 Ill. App. 297; Hennesey v. Manhattan F. Ins. Co., 28 Hun (N. Y.), 98.

[82] Nusbaum v. Northern Ins. Co., 37 Fed. Rep. 524; Rice v. Tower, 1 Gray (Mass.), 426; Tallman v. Atlantic Ins. Co., 29 How. Pr. (N. Y.) 71; 3 Keyes (N. Y.), 87.

[83] Holbrook v. American Ins. Co., 1 Curt. (C. C.) 193; Phœnix Ins. Co., 4 Met. (Ky.) 9; Van Deusen v. Charter Oak Ins. Co., 1 Rob. (N. Y.) 55.

ing a chattel mortgage is a "change of title" avoiding the policy, although it is not a "transfer or change." [84] A condition avoiding the policy if the property insured shall become encumbered by a chattel mortgage is reasonable and valid.[85]

§ **2269. Chattel Mortgage by Partner—Change of Interest.**—The execution of a chattel mortgage by a partner on the partnership chattels, and insured for the benefit of the firm, is such a "change in the interest" in the subject of insurance as will render it void.[86]

§ **2270. Commencement of Foreclosure Proceedings.** Unless the policy by its terms provides that it shall be void in case of the commencement of foreclosure proceedings, such proceedings will not defeat a recovery thereon if a loss occurs before the actual alienation of the property. The mere fact that foreclosure proceedings have been commenced is not an alienation of the insured's interest, within the meaning of the condition rendering the policy void in case of "change of ownership," [87] or upon a sale or alienation of the insured property.[88] The phrase "foreclosure proceedings" has been held to refer only to the ordinary proceedings to foreclose a mortgage. Thus, where there was a mechanic's lien filed after the issuance of a policy, and in an action brought to enforce the same, a judgment was rendered and an execution issued, in pursuance of which the premises were advertised for sale, it was held that this was an exceptional statutory proceeding, and not within the meaning of the phrase.[89] Where at the time of the application no such proceeding had been com-

[84] Citizens' Ins. Co. v. Salterio, 23 Supr. Ct. Rep. (Can.) 155; 14 Can. L. T. 274. See Salterio v. Citizens' Ins. Co. (N. S. S. C. 1895), 14 Can. L. T. 403; Salterio v. London (N. S. S. C. 1894), 14 Can. L. T. 476; affirmed, 14 Can. L. T. (Can. Supr. Ct.) 274.

[85] Olney v. German Ins. Co., 88 Mich. 94; 26 Am. St. Rep. 281.

[86] Olney v. German Ins. Co., 88 Mich. 94; 26 Am. St. Rep. 281; 13 L. R. Annot. 684; 50 N. W. Rep. 100. See, also, East Texas F. Ins. Co. v. Clarke, 79 Tex. 23; 15 S. W. Rep. 166.

[87] Phœnix Ins. Co. v. Union M. L. Ins. Co., 101 Ind. 392.

[88] Chartz v. Cumberland Ins. Co., 44 N. J. L. 478.

[89] Colt v. Phœnix F. Ins. Co., 54 N. Y. 595.

menced, but between the time thereof and the date of the issuance of the policy proceedings of this nature were instituted, it was held that they did not come within the provision of the policy as to foreclosure proceedings, as they were not commenced after the issuance of the policy.[90] Where the policy is forfeited under such a provision, the company may, of course, waive the forfeiture. So where the company had notice of such proceedings, and thereafter required the insured to appear and be examined under oath in accordance with the provision of the policy, it was held that this act on the part of the company constituted a waiver of the forfeiture.[91] The policy may, however, expressly provide that the "commencement of foreclosure proceedings" shall avoid the policy, and, when it is so provided, such proceedings will have that effect.[92] Where insurance is taken on mortgaged property with knowledge that the mortgage is overdue, and through an accidental omission on the part of the agent the insurance is not made payable to the mortgagee, the insured being ignorant of the English language and relying upon the agent, the mere commencement of foreclosure proceedings will not avoid the policy, notwithstanding it provides that it shall become void if any proceedings are taken to foreclose a lien upon the property.[93]

§ 2271. "Entry of a Foreclosure of a Mortgage"—Construction.—The clause that "entry of a foreclosure of a mortgage" will avoid the policy is held not to import a consummated foreclosure or transaction. So where a policy of fire insurance on personal property contained a proviso that "if the title of the property is transferred or changed . . . . this policy shall be void, and the entry of a foreclosure of a mortgage . . . . shall be deemed an alienation of the prop-

[90] Day v. Hawkeye Ins. Co., 72 Iowa, 597; 34 N. W. Rep. 435.

[91] Titus v. Glen's Falls Ins. Co., 81 N. Y. 410; 8 Abb. N. C. (N. Y.) 315.

[92] Meadows v. Hawkeye Ins. Co., 62 Iowa, 387; Quinlan v. Providence-Washington Ins. Co., 45 N. Y. St. Rep. 200; 21 Ins. L. J. 650; 39 N. Y. St. Rep. 820.

[93] Butz v. Ohio Farmers' Ins. Co., 76 Mich. 263; 15 Am. St. Rep. 316.

erty, and this company shall not be holden for loss and damage thereafter," it was held that notice of foreclosure having been duly served, certified, and recorded when the fire occurred, the policy was avoided.[94] If the risk is stipulated to be avoided by the entry of a decree of foreclosure, the advertisement and sale, under a power contained in the mortgage, is not a violation of the contract, where a decree must be ratified by the court to pass title. The sale contemplated is a consummated transaction, by which the interest of the assured is devested.[95]

§ 2272. **Decree of Foreclosure—Sale Thereunder.**—A mortgagee's interest in property insured by him is increased, instead of diminished, by foreclosure, and hence the foreclosure is not a breach of the condition in the policy that it is forfeited by a change in title to the property insured.[96] Where a policy conditioned to be void in case of alienation of the property declared that "a judgment in foreclosure proceedings" should be deemed an alienation, it was held that a decree in a foreclosure suit without further proceedings was not an alienation.[97] If it is stipulated that if the property be sold or transferred, or if any change of title or possession takes place, either by legal process, judicial decree, or voluntary transfer, the policy shall be void, it is held that the subsequent execution and statutory foreclosure of a mortgage will not

[94] MacIntyre v. Norwich Ins. Co., 102 Mass. 230; 3 Am. Rep. 458. In this case the court said: "The parties in their contract have taken pains to avoid saying simply that 'the foreclosure of a mortgage' shall be deemed an alienation. There would be no occasion for them to say that, inasmuch as the law would plainly have said it for them. The meaning of the policy, in our judgment, is that something short of an actual and complete foreclosure shall be considered for the purposes of their contract as a transfer or change of title, and that an entry for foreclosure, or an act which of itself and without any further formality or process on the part of the mortgagee will deprive the insured of all right and title in the property unless he pay the debt, shall be deemed sufficient to terminate the risk."

[95] Hanover F. Ins. Co. v. Brown, 77 Md. 64; 39 Am. St. Rep. 386; 27 Atl. Rep. 314; 29 Atl. Rep. 989.

[96] Esch v. Home Ins. Co., 78 Iowa, 334; 16 Am. St. Rep. 443.

[97] Kane v. Hibernia Mut. Ins. Co., 38 N. J. 441; 20 Am. Rep. 409.

defeat a recovery upon the policy for a loss which occurs before the time for redemption has expired.[98] The general rule seems to be, under such a clause as this, that until the actual delivery of the deed or the expiration of the period for redemption by which the foreclosure proceedings became absolute, the policy is not avoided. So long as the mortgagor retains the equity of redemption, there is no sale, transfer, or alienation of the property, and he may recover under the policy.[99] By the delivery of the deed, however, the policy is avoided.[100] Where the policy is issued to the mortgagee, it is held that a foreclosure by him and the vesting of the entire title in him will not affect his rights under the policy;[101] but where the policy was to the mortgagor, and assigned by him, with the consent of the company, to the mortgagee, it was held that foreclosure proceedings by the mortgagee would avoid the policy.[102]

§ 2273. Notice may Operate as Consent to Mortgage. The sale of the property insured, and the assent of the insurer thereto, together with notice to the local agent, of a purchase money mortgage, is sufficient to operate as an assent on the part of the insurer to the giving of the mortgage, though the policy of insurance contains a provision that if the property shall be thereafter mortgaged without the consent of the company being indorsed thereon, it shall become null and void, and that no agent shall have power to alter or change the terms of the policy, or make any indorsement thereon.[103]

[98] Law v. Home Ins. Co., 24 Minn. 315; 31 Am. Rep. 346.

[99] McKissock v. Mill Owner's F. Ins. Co., 50 Iowa, 116; Strong v. Insurance Co., 10 Pick (Mass.) 40; Sussex Ins. Co. v. Woodruff, 25 N. J. L. 541; Marts v. Cumberland Ins. Co., 44 N. J. 478; Charts v. Cumberland Ins. Co., 44 N. J. L. 478; Haight v. Cont. Ins. Co., 92 N. Y. 51.

[100] Bishop v. Clay F. Ins. Co., 45 Conn. 430; Commercial Ins. Co. v. Scammon, 102 Ill. 46.

[101] Baley v. American Cent. Ins. Co., 4 McCrary (C. C.), 221; Humphrey v. Hartford F. Ins. Co., 15 Blatchf. (C. C.) 504; Esch v. Home Ins. Co., 78 Iowa, 334; 43 N. W. Rep. 229; Bragg v. New England F. Ins. Co., 25 N. H. 289; Heaton v. Manhattan etc. Ins. Co., 7 R. I. 502.

[102] Brunswick Saving Inst. v. Commercial Ins. Co., 68 Me. 313; 28 Am. Rep. 56. See, also, Gaskin v. Phœnix Ins. Co., 6 Allen (N. B.), 429

[103] German Ins. Co. v. York, 48 Kan. 488; 30 Am. St. Rep. 313.

§ **2274. Judgment Generally—Mechanic's Lien—Judgment Lien.**—The policy may provide that if any judgment is obtained against the insured the policy shall be void, unless the consent of the company is given to the continuance of the policy. Such a provision will be binding upon the insured,[104] and the mere entry of judgment will avoid the policy, though in fact no execution could be issued upon such judgment,[105] and though the entry was made without the actual knowledge of the insured.[106] If, however, there is no provision in the policy against liens or judgments, it has been held that no lien placed upon the property will avoid the policy.[107] The filing of a mechanic's lien will not avoid a policy conditioned to be void in case of "encumbrances." [108] Where the policy provided that in case the property should be "levied on or taken into possession or custody under any proceeding in law or equity" it should be void, it was held that the filing of a mechanic's lien, the rendering of a judgment thereon, the issuing of the execution, and the advertising of the property for sale were not acts avoiding the policy, within the meaning of the conditions, and that the insured could recover for a loss occurring subsequent to such acts but before the day of sale.[109] Judgment liens against the property at the time the insurance is effected are not within the meaning of the provision avoiding the policy, "if there be a mortgage, bill of sale, or other lien" on the property insured, without the fact being indorsed on the policy.[110]

§ **2275. Sale of Equity of Redemption—Where Policy Assigned to Mortgagee.**—If an owner of insured property, after executing a mortgage thereon and assigning the policy

[104] Egan v. Mutual Ins. Co., 5 Denio (N. Y.), 326.

[105] Leybert v. Pennsylvania Mut. F. Ins. Co., 103 Pa. St. 282.

[106] Pennsylvania Mut. F. Ins. Co. v. Schmidt, 5 Pa. (L. ed.) 557; 11 Cent. Rep. 845.

[107] Hosford v. Hartford F. Ins. Co., 127 U. S. 404.

[108] Green v. Homestead Ins. Co., 17 Hun (N. Y.), 467. But see Redmond v. Phœnix Ins. Co., 51 Wis. 292; 37 Am. Rep. 830.

[109] Insurance Co. v. O'Maley, 82 Pa. St. 400; 22 Am. Rep. 769.

[110] Georgia Home Ins. Co. v. Schield (Miss. 1895), 19 S. Rep. 94.

to the mortgagee with the consent of the company, subsequently sells the equity of redemption, such sale will avoid a policy which is conditioned to be void in case of "an alienation or a sale" of the insured property,[111] unless the mortgagee has become liable for the assessments.[112]

§ **2276. Writ of Attachment—"Process."**—A condition against change of possession by legal "process" is broken when an officer takes possession of the property by virtue of a writ of attachment issued according to law, even though it afterward appears that there was no ground for issuing such a writ.[113]

§ **2277. "Levied on"—"Taken into Possession or Custody"—Construction.**—The phrases "levied on" and "taken into possession or custody" have the same meaning in the clause of an insurance policy conditioned that the insurance shall cease at the time the "property shall be levied on or taken into possession or custody," and mean an actual levy and change of possession. Mere notice of levy without taking possession of goods will not defeat the policy.[114] "Levied on" does not ordinarily refer to the proceedings commenced by a company for a sale of property. It has more than a technical meaning. It is held to refer to an actual seizure and change of possession.[115] In Kentucky, it has been held that it must be such a levy as divests the insured of his title.[116] If the levy is a wrongful one, being made upon the property as that of another person, it will not avoid the policy upon such property.[117] Where the policy provided that it should

[111] Lawrence v. Holyoke Ins. Co., 11 Allen (Mass.), 387; Smith v. Union Ins. Co., 120 Mass. 90; Hoxie v. Providence Ins. Co., 6 R. I. 517.

[112] Fraiser v. Butler Mut. F. Ins. Co., 7 R. I. 159.

[113] Carey v. German-American Ins. Co., 84 Wis. 80; 36 Am. St. Rep. 907.

[114] Commonwealth Ins. Co. v. Berger, 42 Pa. St. 285; 82 Am. Dec. 504.

[115] Insurance Co. v. O'Maley, 82 Pa. St. 400; 22 Am. Rep. 769; Rice v. Tower, 1 Gray (Mass.), 426.

[116] Pennebaker v. Tomlinson, 1 Tenn. Ch. 598.

[117] Philadelphia etc. Ins. Co. v. Mills, 44 Pa. St. 241; 84 Am. Dec. 437.

be void in case of "the issuing or levy of an execution without actual possession against any kind of property insured," it was held that real estate was not intended by the prohibition.[118]

§ 2278. **Levy of Execution—Sale on Execution.**—A levy of execution on insured property is not an alienation avoiding the insurance, under a provision in a charter against alienation, where a right of redemption still remains to the insured.[119] So the constructive possession of insured goods by the sheriff under an execution is not such a change of possession as avoids the policy,[120] and the sale of real estate on execution, the owner having a term for redemption, is not a change in the title or possession, within the meaning of the insurance policy, where the loss occurs during that term,[121] but if the loss occurs after the expiration of the term, there can be no recovery as from the date of expiration; there is then an alienation.[122] Where the policy upon the mortgagor's interest provided that in case the estate was alienated or encumbered by sale, assignment, or otherwise it should be void, it was held that the seizure of the equity of redemption and a sale on a writ of execution was an encumbrance within the meaning of the policy.[123] Under a statutory or code provision that a judgment debtor is not devested of his title to real property by a sale thereof under execution until the expiration of the period of redemption, such a sale will not render void a policy of insurance conditioned to be void in case the interest of the insured be other than that of unconditional and sole owner, or in case any change takes place in the in-

[118] Shafer v. Phœnix Ins. Co., 53 Wis. 361. See, also, Colt v. Phœnix Ins. Co., 54 N. Y. 595; Insurance Co. v. O'Maley, 82 Pa. St. 400; 22 Am. Rep. 769.

[119] Clark v. New England etc. Ins. Co., 6 Cush. (Mass.) 342; 53 Am. Dec. 44.

[120] Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; 81 Am. Dec. 521. See, also, Franklin F. Ins. Co. v. Findlay, 6 Whart. (Pa.) 483; 37 Am. Dec. 430.

[121] Hammel v. Queen's Ins. Co., 54 Wis. 72; 41 Am. Rep. 1.

[122] Campbell v. Hamilton Mut. Ins. Co., 51 Me. 69.

[123] Campbell v. Hamilton Mut. Ins. Co., 51 Me. 69.

terest, title, or possession of the subject of insurance by legal process or judgment, unless the period for the redemption of the property has expired.[124]

§ 2279. **Waiver of Forfeiture—Sheriff's Sale.**—It is competent for an insurance company to waive forfeiture of a policy caused by a sheriff's sale of the property insured, and it is an express waiver in writing of such forfeiture where the company, having notice of such sale, issues a new policy as an extension of the previous one forfeited.[125]

§ 2280. **Effect of Dissolution of Partnership—Receiver.**—A voluntary dissolution of the partnership and division of the property avoids the policy in Missouri.[126] In New York, it is held that, in an action to dissolve a partnership, the appointment of one of the copartners as a receiver pendente lite is not such a sale or transfer of the property, or change in title or possession as will avoid the policy.[127] If a policy of fire insurance, issued upon a partnership's property, is conditioned to be void if there be a sale or transfer of the property or any change in title or possession whether voluntary or involuntary, the appointment of a receiver during the pendency of the action does not avoid the policy.[128] But upon the entering of a decree that the firm shall be dissolved and the property sold it is held that the insurer is then discharged.[129]

§ 2281. **Accident Insurance on Lives of Partners—Dissolution.**—Where a member of a copartnership was insured against accident as such member, the amount being payable to the surviving representative of the firm, subject to the stipulation that the insurance should cease as to the person of a member leaving the firm, and the insured ceased to be a

[124] Wood v. American F. Ins. Co. (N. Y. C. A. 1896), 44 N. E. Rep. 80; affirming 29 N. Y. Supp. 250.

[125] Elliott v. Ashland M. F. Ins. Co., 117 Pa. St. 548; 2 Am. St. Rep. 703.

[126] Dreher v. Ætna Ins. Co., 18 Mo. 128.

[127] Keeney v. Home Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60.

[128] Keeney v. Home Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60.

[129] Keeney v. Home Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60.

partner before his death by drowning and the dissolution was duly registered, but the jury found that he retained "a continued and active interest in the business," it was held that upon said dissolution the insurance ceased as to insured, and that no action could be sustained by the surviving partners notwithstanding insured's continued interest in the concern.[130]

§ 2282. **Sale between Cotenants.**—In Connecticut it has been held that a transfer from one tenant in common to another is not within the meaning of a clause in the policy rendering it void in case of an alienation by sale or otherwise.[131] And in Pennsylvania a contrary rule has been held.[132]

§ 2283. **Partition of Insured Property—Effect of.**—A partition of insured property in pursuance of an order of court, has been held to constitute a change of title. So where a policy was conditioned to be void "when the title of any property insured shall be changed by sale, mortgage, or otherwise," it was held that a partition of the premises, made pursuant to a judgment on the petition of the cotenant would be within the prohibition; though the partition of the property was not an alienation, it was construed as a material change in the title.[133] A change in the title of property resulting from its partition among its co-owners avoids a policy

[130] McLachlan v. Accident Ins. Co. of North America (Montr. L. Rep.), 4 Sup. Ct. Rep. 365. Upon appeal, however (35 L. C. Jur. (Q. B.) 43; 6 Q. B. 39), a new trial was ordered upon the ground that the real question whether insured had quitted the firm was not passed upon by the jury.

[131] Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553. Here Carpenter, J., said: "The alienation contemplated in the clause in the policy is a sale to a party not insured. Any transfer of interest between the parties insured by the policy is not an alienation within the meaning of the charter. If a party parts with his entire interest, the insurance as to him ceases, and the purchaser, if a stranger to the policy, is not insured; but if formerly a party to the policy, the insurance inures to his benefit." From this opinion, however, Pardee and Loomis, JJ., dissented.

[132] Buckley v. Garrett, 47 Pa. St. 204.

[133] Barnes v. Union M. F. Ins. Co., 51 Me. 110; 81 Am. Dec. 562. See, also, Plath v. Minesota F. Ins. Co., 23 Minn. 479; Hoffmann v. Ætna Ins. Co., 1 Rob. (N. Y.) 501.

of insurance thereon containing a condition that it shall become void if any other change than death takes place in the interest, title, or possession of the subject of the insurance, whether by legal possession or judgment or by voluntary act of the assured or otherwise.[134] But where the parties insured applied for a partition of the property, and in pursuance of an order to that effect the property was sold, it was held that there was no alienation until the sale was confirmed.[135]

§ 2284. Executory Contract of Sale—Conditional Sale.—The fact that the insured has made a contract to sell the insured property does not of itself constitute an alienation within the meaning of the policy; the sale must be actually consummated and there must be such a transfer as to divest the insured of his title. A mere change of possession under such a contract will not invalidate the policy unless it so provides.[136] An insurance upon goods will not be discharged by an executory contract for sale thereof, though there has been a receipt for a portion of the purchase money, if the title to the goods at the time of the loss remains in the person insured, and his right to recover will not be limited to the balance of purchase money remaining due.[137] If the owner of insured premises makes an executory agreement to convey the premises and the vendee under such agreement takes possession and pays a part of the purchase money, this

[134] Trabue v. Dwelling-House Ins. Co., 121 Mo. 75; 42 Am. St. Rep. 523.

[135] Gates v. Smith, 4 Edw. Ch. (N. Y.) 702.

[136] Kemptin v. State Ins. Co., 62 Iowa, 83; Washington Ins. Co. v. Kelly, 32 Md. 421; 3 Am. Rep. 149; Davis v. Quincy M. F. Ins. Co., 10 Allen (Mass.), 113; Boston etc. Ice Co. v. Royal Ins. Co., 12 Allen (Mass.), 381; Worthington v. Bearce, 12 Allen (Mass.), 382; Nelson v. Bound Brook M. F. Ins. Co., 2 N. J. (L. ed.) 579; 10 Cent. Rep. 219; Masters v. Madison Co. Mut. Ins. Co., 11 Barb. (N. Y.) 624; Clinton v. Hope Ins. Co., 45 N. Y. 454; Browning v. Home Ins. Co., 71 N. Y. 508; Gilbert v. North American Ins. Co., 23 Wend. (N. Y.) 43; Trumbull v. Portage Mut. F. Ins. Co., 12 Ohio, 305; Perry Ins. Co. v. Stewart, 19 Pa. St. 45; Farmers' Mut. Ins. Co. v. Graybill, 74 Pa. St. 17; Fire & Marine Ins. Co. v. Morrison, 11 Leigh (Va.), 354.

[137] Boston etc. Ice Co. v. Royal Ins. Co., 12 Allen (Mass.), 381; 90 Am. Dec. 151. See, also, Haley v. Manufacturers' F. Ins. Co., 120 Mass. 292; Hill v. Cumberland Valley Ins. Co., 59 Pa. St. 474.

is a breach of the condition avoiding the policy in case any change take place in the interest of the insured.[138] An agreement by the insured to exchange the insured property for land, the exchange to take place not later than a given date, is not, where the agreement is never executed, within the meaning of a provision avoiding the policy "if any change take place in the interest, title, or possession of the subject of insurance."[139] A mere contract to sell insured wool does not avoid the policy, as there must be in addition to this some act done which passes the property and divests the insured of his title.[140] Where the policy is conditioned to be void in case of any sale, transfer, or change of possession, a mere executory contract of sale, there being no change of possession, will not avoid it.[141] So where a guardian of infant heirs agreed to sell certain property as soon as he had obtained the proper authority, and in pursuance of the contract gave the vendee possession of the property as tenant, it was held that there was no sale within the meaning of the clause, "to be void if the property insured shall be sold or assigned."[142] Where a policy provided that it should be void if the property "shall be sold or conveyed, or the interest of the parties therein changed," it was held that a contract under seal for the sale of the insured premises and a receipt of part of the purchase money avoided it.[143] Such a contract to sell is not of itself a "change of title" that will avoid the policy within the meaning of a provision forbidding such a change.[144] So where, under an executory contract of sale, the title is not to pass unless the vendee makes certain deferred payments, the condition as to change of title is not avoided,[145] though there may

[138] Gibb v. Fire Ins. Co., 59 Minn. 267; 61 N. W. Rep. 137.

[139] Erb v. German-American Ins. Co. (Iowa, 1896), 67 N. W. Rep. 583.

[140] Pitney v. Glen's Falls Ins. Co., 61 Barb. (N. Y.) 335.

[141] Browning v. Home Ins. Co., 71 N. Y. 508.

[142] Clinton v. Hope Ins. Co., 45 N. Y. 454; 51 Barb. (N. Y.) 647.

[143] Germond v. Home Ins. Co., 5 Thomp. & C. (N. Y.) 120; 2 Hun (N. Y.), 540.

[144] Browning v. Home Ins. Co., 71 N. Y. 508.

[145] Home Ins. Co. of New York v. Bethel, 142 Ill. 537; 42 Ill. App. 475; 32 N. E. Rep. 510.

be a part of the purchase money paid.[146] The giving of a bond for the conveyance of land upon a certain condition being complied with at a certain specified time does not constitute an encumbrance upon insured premises.[147] In Iowa it has been held that a contract for the purchase and sale of real estate, under which the purchaser has taken possession, and upon which nothing remains to be done but making the deed and paying a balance due on the price, constitutes a breach of a condition in an insurance policy against selling, conveying, or encumbering, notwithstanding the contract is to become void upon default in making payments at the times agreed, and the abandonment of the contract will not save a forfeiture of the policy.[148] We think this case is not in harmony with other decisions governed by analogous principles. It would seem that so long as the insured had not actually parted with his title to the property and a part of the purchase money remains unpaid, that he has an insurable interest and may recover to the extent of the balance due him from the vendee. The dissenting opinion[149] is more in line with what the true rule should be in such cases. A conditional sale of insured property is not an alienation, but merely suspends the risk

[146] Grable v. German Ins. Co., 32 Neb. 645; 49 N. W. Rep. 713.

[147] Newhall v. Union Ins. Co., 52 Me. 180; Trumbull v. Portage etc. Ins. Co., 12 Ohio, 305.

[148] Davidson v. Hawkeye Ins. Co., 71 Iowa, 532; 32 N. W. Rep. 514.

[149] "The contract between plaintiff and Luit was an executory agreement for the sale and conveyance of the property. Plaintiff was bound upon the performance of his undertaking by Luit to convey the land. But a failure of the latter to pay any installment at the stipulated time would work a forfeiture of all interest in the land and of all sums paid under the contract; and the agreement provided that upon such failure the vendee would surrender possession of the premises. What was the extent of right or interest acquired by Luit under this contract? He did not acquire the ownership of the property, but the right to be invested with the ownership when he had performed his undertaking in the contract. Until that was done both the title and ownership remained in the plaintiff, for by the terms of the agreement Luit would be entitled to the property only after a strict performance of its condition. In Kempton v. State Ins. Co., 62 Iowa, 83, it was held that the policy, which contained a provision similar to that in question, was not defeated by a contract for the sale of the property. It is not material that the difference between that case

during the existence of the condition, and the reversion of the property to the vendor upon the failure of the condition revives the risk and entitles the vendor to all the rights possessed by him before the property was transferred.[150]

§ 2285. Acts of Vendor where Person Holds under Contract of Purchase.—Where a policy issued upon the interest of a person holding under a contract of purchase is conditioned to be void in case of a "change of interest" in the insured property, it is held that a mortgage given by the vendor which creates any obligation upon the vendee for its payment affects the vendee's interest within the meaning of the condition and will avoid the policy.[151]

§ 2286. Where Sale not Confirmed as Required.—Where a sale of property of a decedent which is in the hands of the administrator must be confirmed before it is complete, then there is no alienation until such sale has been confirmed. So where property was sold at an orphan's court sale, it was held that the administrator could recover for a loss occurring after the time of the sale and before it was confirmed.[152]

§ 2287. Where Insurance on Changing Stock of Goods. A condition in the policy of insurance that it shall be void in case of the alienation or sale of the property insured does not refer to the sale of goods which are kept for sale. The policy is not an insurance upon the identical articles in the store at the time the insurance is effected. The insured may sell and replace his stock as often as is necessary, and the policy

and this was that there the purchaser was not entitled to possession until certain payments had been made, and in this case the purchaser was in possession when the fire occurred. The ground of the holding in that case is, that the insured was not divested of the ownership of the property by the contract, and that is the case here."

[150] Power v. Ocean Ins. Co., 19 La. 28; 36 Am. Dec. 665. See, also, Gordon v. Massachusetts Ins. Co., 2 Pick. (Mass.) 249; Jackson v. Massachusetts Ins. Co., 23 Pick. (Mass.) 418; Tittemore v. Vermont M. F. Ins. Co., 20 Vt. 546.

[151] Hoose v. Prescott Ins. Co., 87 Mich. 309; 11 L. R. Annot. 340; 32 Cent. L. J. 226; 47 N. W. Rep. 587.

[152] Farmers' Mut. Ins. Co. v. Graybill, 74 Pa. St. 17.

will cover such property as may be on hand at the time of the loss.[153] Though the policy may provide that it shall be void if the title is changed in any way it does not apply to such a case.[154] So where a policy was issued "on a stock of looking-glasses" in a certain store, it was held that the policy covered all looking-glasses, etc., of the insured which should be in his store during the year, and that a sale of the entire stock only suspended the policy.[155]

§ **2288. Effect of Bankruptcy or Insolvency.**—The rule seems to be settled that an assignment in bankruptcy or insolvency, whether voluntary or involuntary, divests the insured of his insurable interest in the property, and is such an alienation as will avoid the policy.[156] So an assignment of property under voluntary insolvency proceedings is an alienation, within a provision of the policy of a mutual insurance company that "when any property insured by this company shall be taken possession of by a mortgagee or in any way be alienated the policy shall be void."[157] And where a policy of fire insurance was conditioned to be void if any change should take place "in the title or possession of the property, whether by legal process or judicial decree or voluntary transfer," and the insured was declared a bankrupt in involuntary proceedings, and his property was assigned by the registrar to the assignee in bankruptcy, and afterward the insured property was destroyed by fire, it was held that the policy had become void under the condition,[158] though by the

[153] Wolfe v. Security Ins. Co., 39 N. Y. 49. See, also, Commercial Ins. Co. v. Spanknable, 52 Ill. 53; Power v. Ocean Ins. Co., 19 La. 28; Clark v. New England Ins. Co., 6 Cush. (Mass.) 342; Lane v. Maine M. F. Ins. Co., 12 Me. 44.

[154] Biggs v. North Carolina Home Ins. Co., 88 N. C. 141.

[155] Hooper v. Hudson River F. Ins. Co., 15 Barb. (N. Y.) 413.

[156] Birdseye v. City F. Ins. Co., 26 Conn. 165; Adams v. Rockingham M. F. Ins. Co., 29 Me. 292; Reynolds v. Mutual F. Ins. Co., 34 Md. 280; 6 Am. Rep. 337; Keeney v. Home Ins. Co., 3 Thomp. & C. (N. Y.) 478; Perry v. Lorillard F. Ins. Co., 61 N. Y. 214; Starkweather v. Cleveland Ins. Co., 2 Abb. (C. C.) 67.

[157] Young v. Eagle F. Ins. Co., 14 Gray (Mass.), 150; 74 Am. Dec. 673.

[158] Perry v. Lorillard F. Ins. Co., 61 N. Y. 214; 19 Am. Rep. 274.

terms of the policy the loss was made payable to the mortgagee.[159] An exception to the above rule has been made in Massachusetts, in which state it is held that if the assignment for the benefit of the creditors does not release the assured from all liability for any balance due after the distribution of the assets the policy is not avoided, and he may recover to the full extent of the loss.[160]

§ 2289. Death of Insured—Descent of Title to Heirs. If a policy is conditioned to become void upon alienation by the assured, it is not avoided by his death and the consequent change and control of the property by his administrator or by the descent to his heirs.[161] If, however, a policy is conditioned to be void if the interest of the insured shall be changed in any manner, whether by act of the insured or by operation of the law, it has generally been held that the death of the insured will avoid the policy.[162] So where a fire policy was conditioned to be void "if, without the written consent of the company first had and obtained, the said property shall be sold or conveyed and the interest of the parties therein be changed in any manner, whether by the act of parties or by operation of law, or the property shall become encumbered by mortgage, judgment, or otherwise," and the insured died intestate as to all his property, it was held that the policy was void by change of interest.[163] Where the policy is conditioned to be void "in case of any sale, transfer, or change of title in the prop-

[159] Perry v. Lorillard F. Ins. Co., 61 N. Y. 214; 19 Am. Rep. 272; Hazard v. Franklin etc. Ins. Co., 7 R. I. 429. But see Appleton Iron Co. v. British-American Ins. Co., 46 Wis. 23.

[160] Lazarus v. Commercial Ins. Co., 19 Pick. (Mass.) 81.

[161] Burbank v. Rockingham Ins. Co., 24 N. H. 550; 57 Am. Dec. 300. See, also, Pfister v. Gerwig, 122 Ind. 567; 23 N. E. Rep. 1041; Westchester F. Ins. Co. v. Dodge, 44 Mich. 420; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. (Va.) 88. See Appeal of Nichols, 128 Pa. St. 428.

[162] Richardson's Admr. v. German Ins. Co., 11 Ky. L. Rep. 48; Matter of Hine v. Woolworth, 93 N. Y. 75; 45 Am. Rep. 176; Phelps v. Gebhard etc. Ins. Co., 9 Bosw. (N. Y.) 404; Robinson v. Pacific F. Ins. Co., 18 Hun (N. Y.), 395; Hine v. Homestead F. Ins. Co., 29 Hun (N. Y.), 84; Sherwood v. Agricultural Ins. Co., 73 N. Y. 447.

[163] Sherwood v. Agricultural Ins. Co., 10 Hun (N. Y.), 593; 29 Am. Rep. 180.

erty insured," it is held that the policy ceases to have any force upon the death of the insured, and the vesting of the title in his heirs at law.[164] Under the alienation clause of the New York standard fire policy the death of the insured will not void the policy.[165] In some policies the stipulation as to alienation excepts "succession by reason of the death of the insured." Such a clause will also prevent a forfeiture of the policy, at least as to the heirs or administrators.[166]

§ 2290. What Amounts to an Alienation, Sale, Transfer, or Change of Title—Instances.—A conveyance absolute in form by the insured is a transfer or change in title avoiding the policy, although there is a written defeasance dehors the deed or an equivalent contemporaneous oral agreement.[167] A conveyance of insured premises by a husband to a third person, and by that third person to the wife of the insured, will avoid a policy providing that in case the premises are "sold or conveyed in whole or in part" the policy shall be void, though the conveyances are intended as one transaction, and though the husband retains an interest in the land as tenant by curtesy.[168] So, also, in case of a conveyance to the daughter of the insured and by her to the wife;[169] and

[164] Lappin v. Charter Oak etc. Ins. Co., 58 Barb. (N. Y.) 325.

[165] The policy provides that it shall be void for change of interest "other than by the death of the insured."

[166] Quarles v. Clayton, 87 Tenn. 308; 10 S. W. Rep. 505. In this case the court said: "The policy contained the stipulation that it should become void 'in case any change shall take place in title or possession, except by succession by reason of death of the assured.' That these provisions are reasonable is obvious, when we consider that the contract is one for the personal indemnity of the assured against a loss affecting his interest in the property covered by the policy. But this policy was not annulled by the change of title which occurred at the death of the insured; it expressly excepts a defeat of the policy where it occurs 'by succession by reason of the death of the assured.' The legal effect of this exception is to continue and extend the policy notwithstanding the change of title by reason of the death of the assured."

[167] Barry v. Hamburg-Bremen F. Ins. Co., 110 N. Y. 1.

[168] Oakes v. Manufacturing Ins. Co., 131 Mass. 164; Walton v. Agricultural Ins. Co., 116 N. Y. 317.

[169] Baldwin v. Phœnix Ins. Co., 60 N. Y. 164.

where the husband and wife conveyed property to a third person, who executed at the same time a conveyance to the wife which vested the legal title in her, a policy containing the usual clause against the transfer of the property will be avoided, though there was no intention to divest the husband of his interest and control.[170] So a transfer of homestead property from the husband to the wife is a change of title avoiding the policy.[171] If a policy is issued to the mortgagor of the property covered by it and is made payable to the mortgagee, it is held that in such case a subsequent transfer of the entire property to the mortgagee will avoid a policy conditioned to be void if the property "be sold."[172] So, also, where the mortgagor obtained a policy upon the property, and with the consent of the company it was assigned to L., being indorsed, "In case of loss pay the within to L. to secure his mortgage," and he subsequently obtained another policy from the same company, which he assigned with the consent of the company to a purchaser of the property, to whom the insured conveyed his entire interest in the property, it was held that the consent of the insurer thus given would not prevent a forfeiture of the first policy, which was conditioned to be void "in case the insured shall convey either in whole or in part; but it might be continued for the benefit of the purchaser with the company's assent, to be evidenced by a certificate of the fact or by indorsement on the policy."[173]

§ 2291. **What does not Amount to an Alienation, Sale, Transfer, or Change of Title—Instances.**—Where goods upon which there was a mortgage were insured, and the policy provided that it should be void in case of a sale of the insured property, it was held that a subsequent surrender of the possession of such goods to the mortgagee was not a sale within the meaning of the condition.[174] The mortgagor of a vessel, sell-

[170] Langdon v. Minnesota Farmers' M. F. Ins. Co., 22 Minn. 193.
[171] Milwaukee Merchants' Ins. Co. v. Petterlin, 24 Bradw. (Ill.) 188.
[172] Daly v. Westchester F. Ins. Co., 131 Mass. 173.
[173] Loring v. Manufacturing Ins. Co., 8 Gray (Mass.), 28.
[174] Washington Ins. Co. v. Hayes, 17 Ohio St. 432.

ing his remaining interest and stipulating with the purchaser that he, the seller, will pay off the mortgage, if he fails to comply with the stipulation so that the bargain is given up and the title reconveyed to him, may recover on a policy of insurance issued to him before his agreement of sale for a loss of the vessel after reconveyance, and this whether the contract be construed to have passed title or not.[175] A mere agreement between the owner of property insured and another person to represent to the creditors of the owner, in order to prevent attachments, that it had been sold to such other person does not avoid the policy, although the policy is upon condition that the insurance shall be void "in case of any sale, transfer, or change of title."[176] A policy conditioned to be void in case of a change of possession or title is not avoided by the insured leaving an agent in charge of the premises, as this is not a change of possession within the meaning of the provision.[177] If an alienation occurs after a loss, it will not avoid the policy upon the property, though it may appear that neither party had knowledge of the loss when the conveyance was made.[178] A policy conditioned to be void in case of a sale or transfer of the insured property is not avoided by the execution of a trust deed,[179] or by a sale of the land upon which the insured buildings stand, the buildings being reserved.[180] A transfer of the legal title to property to another for the mere purpose, not however accomplished, of having him negotiate a loan upon it for the grantor, does not show a breach of the condition in an insurance policy against sale, transfer, or change of title.[181] Where there was a series of conveyances for the purpose of vesting the complete title in the insured, it was held that the condition in the policy against a sale of the

[175] Worthington v. Bearce, 12 Allen (Mass.), 382; 90 Am. Dec. 152.

[176] Orrell v. Hampden Ins. Co., 13 Gray (Mass.), 431.

[177] Sherman v. Niagara F. Ins. Co., 46 N. Y. 526.

[178] Duncan v. Great Western Ins. Co., 3 Keyes (N. Y.), 394; s. c., 1 Abb. Dec. (N. Y.) 562; 5 Bosw. (N. Y.) 378, note; 19 How. Pr. (N. Y.) 312; Farmers' M. Ins. Co. v. Graybill, 74 Pa. St. 17.

[179] Nease v. Ætna Ins. Co., 32 W. Va. 283; 18 Ins. L. J. 541.

[180] Washington Mill Emery Mfg. Co. v. Connecticut Ins. Co. (Mass. 1883), 12 Ins. L. J. 181.

[181] New Orleans Ins. Co. v. Gordon, 68 Tex. 144; 3 S. W. Rep. 718.

property was not violated.[182] In this case the wife of the insured held a tax title upon the property, and conveyances were made by the wife of the insured and the insured to a third person, who immediately reconveyed the entire estate to the insured. The word "interest" includes both legal and equitable right, and therefore what might be a change of interest might not be a change of title.[183]

§ **2292. Change in Possession.**—A condition in a policy of insurance that it shall become void by any change in the possession of the property insured must be held to refer to some change in the possession during the term of the policy, and not to one made before the application for the policy.[184] Change in the possession of the premises insured will not avoid a policy of insurance made payable to a mortgagee, if he was not aware of such change and the policy provided that it should not affect him unless he should fail to give notice thereof after the change became known to him.[185] Though the policy may provide that in case of the sale of the subject of the insurance written notice must be given to the company and its assent to such sale indorsed on the policy, and if the company cancels the policy, it shall refund a ratable proportion of the premium; yet, if the company having the policy in its possession is orally notified of a sale and orally consents thereto, and does not offer to return the unearned premium, this will operate as a waiver of the conditions as to consent and notice.[186]

§ **2293. Sales by Partner—Alienation, Assignment, and Change of Title or Possession Clauses.**—The question whether a sale by one partner to another of his interest in the partnership property is in violation of the conditions that if the insured property be "alienated by sale or otherwise,"

[182] Kyte v. Commercial Union Assur. Co., 144 Mass. 45.

[183] Gibb v. Fire Ins. Co., 59 Minn. 267; 61 N. W. Rep. 137.

[184] Allemania F. Ins. Co. v. Peck, 113 Ill. 220; 23 Am. St. Rep. 610.

[185] National Bank v. Union Ins. Co., 88 Cal. 497; 22 Am. St. Rep. 324.

[186] Moffitt v. Phenix Ins. Co., 11 Ind. Ind. App. 233; 38 N. E. Rep. 835; 24 Ins. L. J. 154.

or if the "property be sold or conveyed," the policy shall be void has been the subject of frequent consideration by the courts, and is so unsettled that no definite conclusive rule applicable to all the states can be deduced; that is, if the rule stare decisis be adhered to by the several courts. The decisions upon this point, as well as those covering sales by a partner to a third person, or those relating to taking in a new partner, will be considered in the note appended to the last section of this chapter.

§ **2294. Summary of Decisions.**—It is only possible to make a general summary of the decisions in the several states, as the particular conditions in each case have necessarily influenced the opinions of the courts. It may, however, be generally stated that a sale between partners avoids the policy in Illinois (where the entire interest is transferred), in Indiana, Iowa, Pennsylvania, and Wisconsin. Such sale does not avoid in Alabama, Colorado, Louisiana, Mississippi, New Hampshire, New York, Ohio, Texas, Virginia, and under one federal case. In Tennessee it avoids as to the interest of an assignee before transfer. A sale between partners with a reservation of interest avoids in Iowa and Missouri, but not in Georgia and Illinois. In Massachusetts and New York a sale between partners with a mortgage back does not avoid. The introduction of a new partner avoids in Connecticut, Michigan, North Carolina, and under one federal case, but not in Florida, where the new partner had an interest in the profits but not in the property, nor in Ohio, New York, nor under one federal case; while in Washington an agreement to take a new partner, which is not consummated, does not avoid. A sale to third parties avoids in California and Illinois.

§ **2295. Conclusion.**—It is evident from the decisions and opinions above given that the general rule may be deduced, and it is supported by the weight of authority and of reasoning, that a sale between partners is not such a transfer as will avoid the policy; and a question may fairly be raised whether it is within a stipulation against a change of possession. The above rule must, however, be necessarily

subject to change in those cases where the policy expressly, in clear terms and not by construction or implication alone, prohibits a transfer or sale between partners. A sale between partners with a reservation of interest ought not to avoid; nor does a sale between partners with a mortgage back avoid the contract, but a sale to third parties or the introduction of a partner avoids the policy. So a voluntary dissolution of the partnership and a division of the profits and property would avoid the contract.[187]

[187] *Sale by One Partner to Another—Alabama.*—In Alabama, if the policy contains a provision that the assignment of the same, or any interest therein or an alienation of the property without the assent of the company indorsed thereon, avoids it, such a sale, and the assignment by the retiring partner to his copartners, who continue the business, of his interest in the policy, does not avoid it: Burnett v. Eufaula Home Ins. Co., 46 Ala. 11; 7 Am. Rep. 581; Burnett v. Eufaula Home Ins. Co., 46 Ala. 11, criticised as carrying the "doctrine farther than was warranted by the cases to which it referred as authority, and farther than the rules of fair construction would permit." etc.: 1 Wood on Fire Insurance, 2d ed., p. 739. In another case in this state where a policy was issued on a debtor's life for the benefit of his creditor, a copartnership, and there was a stipulation against assignment except with the insurer's consent, it was held that the transfer without the company's approval by one partner to another of the former's interest did not operate to defeat the right of action of the transferee. It appeared, however, that the transferring partner died before action brought, which was held to vest in the surviving partner the sole right to sue: Piedmont etc. L. Ins. Co. v. Young, 58 Ala. 476.

Sale by Partner to Third Party—California.—In California, the transfer by one partner to a third party without the stipulated assent of the insured avoids the policy: Shuggart v. Lycoming F. Ins. Co., 55 Cal. 408.

Sale by One Partner to Another—Colorado.—In Colorado, the transfer between partners is not a breach of the condition: Sun F. Office v. Wich (Col. App. 1894), 39 Pac. Rep. 586; following and citing Insurance Co. v. Vaughan, 88 Va. 832; 14 S. E. Rep. 754; Insurance Co. v. Cohen, 47 Tex. 407; Association v. Hollberg, 64 Miss. 51; 8 S. Rep. 175; West v. Insurance Co., 27 Ohio St. 1; Pierce v. Insurance Co., 50 N. H. 297; Dermain v. Insurance Co., 26 La. Ann. 69; Powers v. Insurance Co., 136 Mass. 108; Hoffman v. Insurance Co., 32 N. Y. 405.

Introduction—New Partner—Connecticut.—If a policy upon partnership property provides that it shall be void if there is a change in interest, title, or possession, it is held that the taking in of a new partner will be such a change, within the meaning of the

condition, as will avoid the policy: Malley v. Atlantic F. & M. Ins. Co., 51 Conn. 222.

Sale with Reservation of Interest to Partner — Georgia. — A mere agreement of sale between partners made during the term of the insurance and before loss does not vitiate a policy taken out by partners in their firm name upon partnership personalty, notwithstanding, that by such contract one of the partners sells his interest in the insured property to the other partner, where there is also a reservation of the title until payment of the purchase price, and it appearing that at the same time of loss payment in full had not been made, and that the selling partner still retained a half interest in said property: Georgia Home Ins. Co. v. Hall, 94 Ga. 630; 21 S. E. Rep. 828. In this case the policy was stipulated to be void if there should be a mortgage, bill of sale, or other lien upon the property, or any part of it, either prior or subsequent to the issuance of said policy without the fact being indorsed thereon, or if any change should take place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree, or if the policy before loss be assigned without insurer's consent, or if the insured was not the sole, absolute, and unconditional owner of said property.

Introduction — New Partner — Florida.—If a policy is issued conditioned to be void if there be a sale or transfer of the insured property or any change in the title or possession, the admission of a stranger to the firm, who is simply to have a certain interest in the profits of the business, but no interest in the properties of the firm, is not within the prohibition: Hanover F. Ins. Co. v. Lewis, 23 Fla. 193; 10 S. Rep. 297; 21 Ins. L. J. 316.

Sale to Partner or Third Person—Illinois.—In Illinois, a condition in a policy of insurance requiring notice to be given to the company of any contract to sell the property insured must be held to apply only to contracts of sale between the insured and third parties, and can have no application to contracts between the insured themselves for the sale or transfer of their respective interests as partners or joint owners, so long, at least, as the party selling retains an insurable interest in the property insured: Allemania F. Ins. Co. v. Peck, 133 Ill. 220; 23 Am. St. Rep. 610. In this case the court said: "The preponderance of authority in this country is clearly to the effect that such condition is not broken by a sale by one partner to another of his joint interest, at least, so long as the party selling retains an insurable interest . . . . The actual interests of partners in the firm property are necessarily fluctuating, and there seems to be no particular reason why the insurers should wish to keep the ownership unchanged as between them, so long as all retain an insurable interest." This opinion refers to Dix v. Mercantile Ins. Co., 22 Ill. 272, and says: "The court . . . . held that the assignment by a partner to his copartners of all his interest in the property insured was a breach of the condition of the policy in that case. It should be observed, however, that said condition provided that the policy should be void in case of 'any transfer or change of title of the property

insured, or of any undivided interest therein,' a condition which may well be construed as applying even to a sale, by one partner to the other partners, of his interest in the partnership property." In this last case the condition was, "in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease." There was a transfer of an undivided interest, and in the opinion the court said: "The intention of the company was manifestly as urged, that no stranger should come into the management and care of the property without their consent. Knowing the parties with whom they were contracting, relying upon the fidelity and circumspection of each and every one of them, they were willing to take the risk at the premium stipulated. It was an object of the first importance with them to secure for the property the guardianship and care of faithful and trustworthy men, and for this they were willing, for the premium, to intrust the property to the care of Sinclair, Dicks, and Harris, but not to the care of Dicks and Harris alone. Is it not plain that the insured may be as greatly prejudiced by removing one to whom, with others, they had trusted the guardianship of valuable property, as by the introduction of a stranger? The one removing from the concern may have been the very one in whose vigilance, fidelity, and care the greatest share of confidence was reposed, and by his so removing the hazard is increased to the assurer without any corresponding increase of premium."

Sale by One Partner to Another—Indiana.—In Indiana, where the policy was to be void "in case of any sale, transfer, or change of title of any property insured by this company or of any undivided interest therein," and it was held that a sale by one partner to another of his interest in partnership property would avoid the policy: Hartford F. Ins. Co. v. Ross, 23 Ind. 180.

Sale with Reservation of Interest to Partner—Iowa.—If the policy stipulates against change of possession, it is avoided where it is made to a firm which as such owns and has possession of the stock insured, and the firm dissolves, the remaining partner taking possession of the entire stock and giving his notes therefor, doing the business in his name, although the retiring partner reserves the right to see that the stock is kept to its value at the time the change took place, and, if there was a failure to pay on time, said retiring partner's interest to continue until payment made: Jones v. Phœnix Ins. Co. (Iowa, 1896)) 66 N. W. Rep. 169.

Sale by One Partner to Another—Louisiana.—In a case which arose in Louisiana the policy contained the following condition: "This policy is not assignable unless by consent of this corporation manifested in writing, and in case of any transfer by sale, or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." The court held that this did not apply to the sale by one partner to his copartner of his interest in the firm, and in this connection said: "Was it the understanding of the parties that the plaintiff could not buy out his partner and continue the business without the consent of the defendants on pain of forfeiting the policy? The prohib-

itory clause must be construed strictly. And if its application to the case before us be doubtful, the doubt must be construed against the defendants, the obligors in the contract of insurance. It is true the clause expressly prohibits the transfer, by sale or otherwise, of the policy, but it does not expressly prohibit a change of interest among the partners, nor does it expressly prohibit the assignment of the interests of one partner to the other. If the defendants had intended to place such a limitation upon the rights of the assured, the intention should have been expressed in the instrument, and not left to inference, because a prohibitory clause cannot be extended by implication . . . . In the course of business, partners often become dissatisfied and change the firm by one partner transferring his interest to the other, as was done in this case. This occurrence is so common that the parties are presumed to have contracted, knowing it might arise during the period of the insurance; and if it was desirable to put a limitation upon the right of the assured in this respect, a stipulation to that effect should have been inserted in the instrument. By the assignment no new party is introduced into the contract whom the defendants might not be willing to trust": Dermain v. Home Mut. Ins. Co., 26 La. Ann. 69; 21 Am. Rep. 544.

Sale by One Partner to Another and Mortgage Back—Massachusetts.—In Massachusetts, it is held that a sale by one partner to his copartner and a mortgage back of the seller's share of the partnership property will not avoid a policy of insurance issued to the partnership and conditioned to be void, if without the written consent of the insurer "the said property shall be sold," or "the situation or circumstances affecting the risk shall, by or with the advice, agency, or consent of the insured, be so altered as to cause an increase of risk": Powers v. Guardian F. & L. Ins. Co., 136 Mass. 108; 49 Am. Rep. 20.

Introduction of New Partner—Michigan.—If the policy forbids a change of title, the forming of a partnership between the sole owner and a stranger is held to avoid the policy: McEwan v. Western Ins. Co., 1 Mich. N. P. (Brown's) 118.

Sale by One Partner to Another—Mississippi.—In Mississippi it is held that a fire policy, conditioned to be void in case of the sale of the insured property, is not avoided by a sale by one partner to the other of his interest in the property insured: New Orleans Ins. Assn. v. Holberg, 64 Miss. 51.

Sale by One Partner to Another—Mortgage Back—Missouri.—In a case decided in the Missouri appellate court, S. and N. were partners, obtained a policy of insurance upon their property conditioned to be void if the property "be sold or transferred or any change take place in the title or possession," and subsequently admitted K. to the partnership, and before loss S. sold his partnership interest to N. and K., and took a chattel mortgage back; it was held there was such a change in title and possession as to avoid the policy: Card v. Phœnix Ins. Co., 4 Mo. App. 424. So a dissolution of partnership before loss

and a division of the goods, so that each partner owns distinct portions, is held to avoid a policy conditioned to be void in case of "any transfer or change of title in the property insured": Dreher v. Ætna Ins. Co., 18 Mo. 128.

Sale by One Partner to Another—New Hampshire.—In New Hampshire a sale by one partner to another of his joint interest in the property insured is not such an alienation as will avoid a policy conditioned to be void in case of alienation by sale or otherwise: Pierce v. Nashua F. Ins. Co., 50 N. H. 297.

Sale by One Partner to Another—Introduction of New Partner—New York.—Where a policy issued to D. & C., insuring partnership property, was conditioned to be void "by the sale or transfer or any change in title or possession of the property insured," it was held that the dissolution of the partnership and the transfer of C.'s interest in the property to D., and the giving of a chattel mortgage by D., did not work such a transfer of interest as to avoid the policy: Dresser v. United Firemen's Ins. Co., 45 Hun (N. Y.), 289. In another case, where a policy held by partners in common was conditioned that "when the property insured shall be alienated by sale or otherwise the policy shall be void," a conveyance by one partner to the other partners without the company's assent was held a voidance of the policy so far as the third parties' rights had not intervened: Tillou v. Kingston Mut. Ins. Co., 5 N. Y. 405. In Hoffmann v. Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337, the question was exhaustively considered and the New York decisions were carefully reviewed. In this case there had been a policy issued to the firm covering partnership goods and goods held in trust or on commission. The policy provided that "if the said property be sold or conveyed" the policy should be void. One of the partners retired subsequently to the issuance of the policy and transferred his interest to the remaining members of the firm. After his retirement a loss occurred, and the company refused to pay, alleging a violation of this condition. A verdict was found for the plaintiff in the lower court and was affirmed on appeal. In this case the court said: "The weight of judicial authority in this state is against the doctrine that a policy issued to a firm is forfeited by a transfer of interest as between the parties assured." And again, after reviewing the cases, the court continues: "It is quite apparent, therefore, that in this state there is a decisive preponderance of judicial authority against the recognition of a sale by one to another of the assured as cause of forfeiture within the meaning of the proviso. But if the authorities were in equipoise, and the solution of the question depended on general reasoning and the application of settled and familiar principles of law, our conclusion would be in accordance with that of the court below." Under another decision in the same state it is held that the taking of a partner by the assured, and the transfer to him of an interest in the property, avoids a policy containing a provision against sale, transfer, or any change in title or possession, though the policy states that insurer will make good to insured, his heirs, etc., all immediate loss that results from destruction from the perils insured against: Germania F.

Ins. Co. v. Home Ins. Co., 144 N. Y. 195; 43 Am. St. Rep. 749; 24 Ins. L. J. 382; 26 L. R. Annot. 591. In this case the policy was issued to a sole trader, who subsequently took in a partner, and the condition was that the policy should be avoided in case "the property be sold or transferred, or any change take place in title or possession." The court in this case said: "The right of the insurance company was in nowise invaded when this court held that a sale by one partner to another of his interest, where both were insured, did not avoid the policy. It is only when a stranger is brought into contractual relations with the insurance company that the consent of the latter is essential." In a late case in this state it is held that if a policy is issued to a firm upon partnership property, and provides that it shall be void if the interest of the insured be other than the sole and unconditional ownership, one of the members of the firm may assign his interest therein without affecting the sole and unconditional ownership: Wood v. American F. Ins. Co. (N. Y. C. A. 1896), 44 N. E. Rep. 80; affirming, 29 N. Y. Supp. 250.

Sale by One Partner to Another—Introduction of New Partner—Ohio.—Condition against sale or transfer is not broken by a sale of a part of the interest of the insured therein; as where he takes a partner, and the property becomes vested in the partnership. After such sale the partner insured may maintain an action in his own name, but can recover only to the extent he has been damaged: Blackwell v. Insurance Co., 48 Ohio St. 533; 29 Am. St. Rep. 574. In this case the stipulation was: "If . . . . said assured should sell or transfer the property thereby insured, that said policy should become null and void." The court said: "It was competent for the policy to provide expressly that a sale of a part of the property or of an interest therein should avoid the policy. . . . . It was competent for the parties to provide in unambiguous terms that if the assured received into the business without the consent of the insurer a partner, the policy should become void. This was not done, and we think . . . . that the sale and transfer resulting from the reception of a partner did not avoid the policy": Blackwell v. Insurance Co., 48 Ohio St. 533; 29 Am. St. Rep. 574; 29 N. E. Rep. 278. It was held under an earlier decision that when the policy provides that the assignment of some or of any interest therein without the consent of the company indorsed thereon avoids it, such a sale and the assignment by the retiring partner to his copartners, who continue the business, of his interest in the policy, does not avoid it: West v. Citizens' Ins. Co., 27 Ohio St. 1; 22 Am. Rep. 294. The code, however, allowed the parties in interest to sue in their own names.

Introduction of New Partner—North Carolina.—If the policy stipulates that a sale of the property will avoid it, the admission of a new member is within the condition: Biggs v. Ins. Co., 88 N. C. 144.

Sale by One Partner to Another—Pennsylvania.—In Pennsylvania, while it was held that a transfer by one tenant in common to a

cotenant, or from one partner to another, against a condition to that effect, would avoid the policy, it was also held that if the policy was to run 'so long as the yearly payments stipulated are continued," and after an assignment, which was approved by the company, one of the partners insured transferred his interest to his copartner, who thereafter for several years made the yearly payments, but gave no notice to the company of the transfer, it was further held that the policy was not necessarily avoided, but that it was a question for the jury as to the company's knowledge in the matter showing their agreement to the alienation, and thereby a waiver: Buckly v. Garrett, 47 Pa. St. 204. And see, also, opinion of Loomis, J., in Lockwood v. Middlesex Mut. Ins. Co., 47 Conn. 573.

Sale by One Partner to Another—Tennessee.—In Tennessee, it has been held that where two partners take an insurance upon their stock of goods and the policy is conditioned to be void in case of an assignment, "whether of the whole policy or of any interest therein," and during the continuance of the policy one of said partners sells and assigns his interest in said stock of goods to the other, the risk continues as to the interest of the assignee in the goods which he owned at the time of the insurance, and he may recover in an action brought in the name of the firm for his use and loss of his original interest, but not for a loss to the interest of his copartners so assigned to him; for that has ceased to be covered by the policy: Hobbs v. Memphis Ins. Co., 1 Sneed (Tenn.), 444.

Sale by One Partner to Another—Texas.—In this state, where a policy issued to a partnership of three persons, provided that it was "not assignable unless by consent of this corporation manifested in writing, and, in case of any transfer, by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect," it was held not to be avoided by the sale by one partner to his copartner of his interest in the partnership property: Texas Bank etc. Co. v. Cohen, 47 Tex. 406; 26 Am. Rep. 298.

Sale by One Partner to Another—Virginia.—In Virginia, where one partner in insured property transfers his interest in insured property to the other partner, recovery for loss thereof is not barred by reason of a clause in the policy forbidding any change in the title or interest of insured: Virginia F. & M. Ins. Co. v. Vaughan, 88 Va. 832; Virginia F. & M. Ins. Co. v. Saunders, 84 Va. 210; 14 S. E. Rep. 54.

Agreement for Partnership not Consummated—Washington.—In this state a mere agreement to form a partnership and the performance of acts consistent with the existence of the partnership agreed upon will not invalidate the policy where the partnership is in fact never entered upon: Pencil v. Home Ins. Co. (Wash. S. C. 1892), 28 Pac. Rep. 1031.

Sale by One Partner to Another.—Wisconsin.—In a Wisconsin case, where a policy was originally issued to partners, and provided that if the property insured should be "sold or conveyed without the consent of the company obtained in writing on the policy, it should be

void," it was held that a sale by one partner to the other avoided the policy: Keeler v. Niagara Ins. Co., 16 Wis. 523; 84 Am. Dec. 714.

Sale by One Partner to Another—Introduction of New Partner—Federal Decisions.—Where the policy provided that it should be void "if the property insured be sold or transferred, or any change take place in the title except by succession by reason of the death of the insured, whether by legal or judicial process or voluntary transfer or conveyance," it was held that the sale or transmutation of the various interests of the partners between themselves alone did not avoid the policy, but that the introduction of a new partner with an investiture of interest in him which he did not before have would defeat a recovery: Drennen v. London Assur. Co., 20 Fed. Rep. 657. But in an earlier case it was held that a condition that the policy should be void if the property "be sold or conveyed" was not broken by the subsequent formation of a copartnership between insured and third parties, and the placing of the insured property in the copartnership assets. The policy still covered the interest remaining in the assured: Scanlon v. Union F. Ins. Co., 4 Biss. (C. C.) 511.

Opinions of Text-writers. — Mr. Angell says: "When underwriting for a firm the insurer is presumed to know and to be satisfied with each and every one of its members. He is presumed to know that on the death of either of two partners the survivor, for all purposes, becomes the sole legal, and, on a favorable state of account, the sole equitable, owner of the partnership assets. The insurer, too, knows that on a voluntary dissolution of the firm the other will thereby have been made the sole owner of the assets remaining," and cites a New York case to the effect that a transfer of interest from one partner to another is within the original understanding, and will not prevent a recovery: Angell on Fire and Life Insurance, ed. 1855, p. 666, sec. 200a, citing Wilson v. Genesee Mut. Ins. Co., 16 Barb. (N. Y.) 511. Mr. Bates expresses no opinion, merely noting the cases, although he says: "It is to be wished that these distressing complications might be set at rest by the companies themselves, or by appropriate legislation": 1 Bates on Partnership, ed. 1888, sec. 270, et seq. Mr. May says: "It has also been held that where such a change of property has been made recovery can be had only for the loss of so much as has not been transferred, i. e., the interests of the remaining parties, but upon principle it seems to be reasonable that the plaintiffs, being owners at the time of the insurance and thence to the loss, should recover the entire loss, and such seems to be the weight of authority": 1 May on Insurance, 3d ed., sec. 279. Mr. Ostrander says: "When, however, the policy stipulates only against a change of title or ownership, it has generally been held that any change between the partners does not discharge the insurer; but the rule is otherwise when a stranger is received into the firm," although the head-notes to subsequent sections are, "a sale by one partner to his associate voids the policy . . . . When a partnership is dissolved and the property divided the insurance terminates": Ostrander on Fire Insurance, ed. 1892, pp. 251, 257, secs. 106, 108, 109. Mr.

Parsons says that "the better opinion is that where a partner conveys his interest to a copartner, the policy is not avoided under such a clause. The same reasoning would seem to apply to a conveyance of his interest by a partner to a third person. The partnership alone can transfer a chattel; the partner transfers only his right to account. There is some authority for such a rule, but the prevailing view would seem to be that the policy is avoided by such a transfer": Parsons on Partnership, 4th ed., p. 235, sec. 180. Mr. Wood says: "As a general rule, it may be said that the tendency of the courts is to hold that unless the language of the policy is such as to clearly prohibit a sale of the interest of one joint owner to another in the joint property, and the policy can fairly be upheld in the face of such a prohibition, or if there is any doubt as to whether it was intended to apply to such a sale, the prohibition will be held not to apply in such cases, but will be restricted to the case of sales to a stranger." He is also of opinion that a decree of dissolution of the firm and division of the property releases the insurer: 1 Wood on Fire Insurance, 2d ed., 744, 745, 748.

CHAPTER LI.

ASSIGNMENT AND TRANSFER OF POLICY.

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§ 2304. Assignment of Policies—Fire Insurance.—A policy of fire insurance is a personal contract, and in the absence of the consent of the insurer, it cannot be assigned so as to permit the assignee to sue thereon in his own name. The contract is that the assured shall sustain no damage to the extent of the amount named in the policy, and though it is an insurance on the property, still it does not pass with the sale thereof, and is considered only as a contract of indemnity to the person named in the policy.[1] The insurer may, however, where the property has been sold, give his consent to an assignment of the policy, and when so given the contract is a new one between the assignee of the original insured and

[1] See sec. 23, herein.

the company.[2] In the absence, however, of any provision in the policy as to assignment, fire policies cannot be assigned without consent of the insurer so as to give any rights thereunder against the company to the assignee, as they are not negotiable instruments. So long as the property remains in the original insured, he may recover upon the policy, but if he parts with the subject matter of the insurance, the policy, being a personal contract between him and the company to cover property owned by him alone, is at an end, as he has no interest in the property insured and the assignee has no rights thereunder, as a fire policy, being a personal contract, cannot be assigned so as to transfer the obligation thereunder to another without the consent of all the parties.[3] The insurance may, however, by agreement of the parties be made to follow the title to the property.[4]

§ 2305. Assignment of Fire Policies—"Loss if any Payable to."—In addition to the class of assignments which we have mentioned in the preceding section, there is another species, which is similar to that of the assignment of a chose in action. We refer to those cases where the policy is issued to one person, "loss if any payable to" another, or "in case of loss pay the amount to ——."[5] An insurance

[2] Donnell v. Donnell, 86 Me. 518; 20 Atl. Rep. 67; 24 Ins. L. J. 371; Fogg v. Ins. Co., 10 Cush. (Mass.) 337; Wilson v. Hill, 3 Met. (Mass.) 66, Shaw, C. J.; Mowry v. Todd, 12 Mass. 281; Bonenfant v. American F. Ins. Co., 76 Mich. 653; 43 N. W. Rep. 682; Rollins v. Insurance Co., 25 N. H. 207; Folsom v. Insurance Co., 30 N. H. 240; Cummings v. Insurance Co., 55 N. H. 457, 460.

[3] Simeral v. Dubuque M. F. Ins. Co., 18 Iowa, 319; Adams v. Rockingham Ins. Co., 29 Me. 292; Loring v. Manufacturers' Ins. Co., 8 Gray (Mass.), 28; Tate v. Citizens' Ins. Co., 13 Gray (Mass.), 79; Jack v. St. Louis Ins. Co., 7 Mo. App. 308; Rollins v. Columbia Ins. Co., 5 Fost. (N. H.) 204; Mutual Prot. Ins. Co. v. Hamilton, 5 Sneed (Tenn.), 269; Ætna F. Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25; Alexandria v. Lawrence, 10 Pet. (U. S) 512; Sadlers Co. v. Babcock, 2 Atk. 554; Lynch v. Dalzell, 4 Brown Parl. C. 431; 3 Brown Parl. C. 497, per Lord Chancellor King.

[4] Carpenter v. Providence Ins. Co., 16 Pet. (U. S.) 501.

[5] Referring to this class of cases, Shaw, C. J., says (Fogg v. Insurance Co., 10 Cush. (Mass.) 337: "It is a contingent order or as-

policy making loss payable to another than assured must be regarded as having been at its inception assigned to such other person with the consent of the company, and it is not necessary for him to obtain a transfer of the policy from the assured, assented to by the company, as in ordinary cases.[6] A provision that a loss shall be payable to a mortgagee or his assign as his interest may appear, operates only as a conditional appointment to pay so much of the proceeds of the policy as may be equal to the amount of the mortgage at the time of a loss under the policy. Such provision does not amount to an assignment of the policy, so that in case of loss the mortgagee alone may sue and recover for it. The right of action is still in the mortgagor.[7]

§ 2306. **Assignment of Fire Policies—Generally.**—Where a policy has been assigned under seal, it implies a consideration, against which an unsupported denial of a consideration will be of no avail.[8] The fact that the insured has attempted to assign the policy will not render it void, unless he has at the same time parted with his interest in the property

signment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because upon notice of assignment the insurer has agreed to pay the assignee instead of the assignor: Mowry v. Todd, 12 Mass. 281. But the original contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains as a contract of guarantee to the original assured. He must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest prima facie in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest and a right to recover, which right he has transferred to the assignee with the consent of the insurers." See, also, Pratt v. New York etc. Ins. Co., 64 Barb. (N. Y.) 589; Mershon v. National Ins. Co., 34 Iowa, 87; Brown v. Roger Williams Ins. Co., 5 R. I. 394; Keeler v. Niagara F. Ins. Co., 16 Wis. 523; Aldrich v. Equitable Safety Ins. Co., 1 N. & M., N. S., 272.

[6] National F. Ins. Co. v. Crane, 16 Md. 260; 77 Am. Dec. 289.

[7] Williamson v. Michigan F. & M. Ins. Co., 86 Wis. 393; 39 Am. St. Rep. 906.

[8] Mutual Prot. Ins. Co. v. Hamilton, 5 Sneed (Tenn.), 269.

insured.[9] And if the assignment of the policy has been made before the loss, but between the time of making it and the delivery thereof a loss has occurred, it will not defeat a recovery thereon, as the assignment will take effect only from its delivery, and, in such a case, will constitute an assignment after loss.[10] Though the insured is required to set forth the nature of his interest in the property, it is held that this rule does not apply to the assignment of policies in force.[11] Under the Massachusetts form of policy no one can avail himself of a contract of fire insurance except the parties thereto or their legal representatives, except where the transfer is a valid one, assented to by the insurer.[12] It has been held in Wisconsin that the assignor may, where he is incapacitated by drunkenness at the time of the assignment, maintain an action to recover the policies, or the value of the same, and that he need not first resort to equity in order to have the assignment set aside.[13]

§ 2307. Sale of Property does not Transfer Policy to Purchaser.—A policy of fire insurance is, as we have stated, strictly a personal contract, and as such cannot be assigned, so as to introduce a new party into it, without the consent of the insurer; consequently, the policy does not pass to the purchaser of the property insured, so as to substitute him for the originally insured, without the company's consent. It is not an incident of the subject of insurance.[14] Though the property may not be sold until after a loss, this does not vary the rule, in the absence of an assignment of the policy.[15] Though a policy of insurance on partnership property may be one of the choses in action of the firm, still it does not

[9] Smith v. Monmouth Ins. Co., 50 Me. 96.

[10] Watertown F. Ins. Co. v. Grover etc. M. Co., 41 Mich. 131.

[11] Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 67; Cumberland etc. Ins. Co. v. Mitchell, 48 Pa. St. 374.

[12] Carroll v. Boston Ins. Co., 8 Mass. 515.

[13] Bensinger v. Watertown Bank, 67 Wis. 75; 58 Am. Rep. 845.

[14] King v. Preston, 11 La. Ann. 95; Lahiff v. Ashuelot Ins. Co., 60 N. H. 75; Lett v. Guardian F. Ins. Co., 34 N. Y. St. Rep. 411; 20 Ins. L. J. 176; 25 N. E. Rep. 1088; Lynch v. Dalzell, 3 Brown Parl. C. 497.

[15] Pierce v. National Ins. Co., 50 N. H. 297.

pass with the sale of the property, unless it appears that it was the manifest intention of the parties that it should.[16]

§ **2308. Assignment—Legal Effect of Assent to in Fire Policy.**—An assignment of a policy of fire insurance may be made with the consent of insurer, and such assignment will pass with it everything necessary to carry the purpose of the assignment into effect, though an actual assignment of the original indebtedness is not made.[17] If the insured property is sold and the policy of insurance assigned to the purchaser with the insurer's consent, the original parties to the contract have become changed, and it is a new contract and the assignee is recognized as the assured party.[18] Where the policy has been so assigned, the assignee becomes liable for the premiums and the assignor is discharged from his liability therefor.[19] Though the policy may require assent to be given before assignment, a forfeiture may be waived by subsequent consent thereto;[20] but it is held that such consent will not, if the policy was originally void, render it a valid one.[21] Consent of insurers operates as a reissue of the policy to a substituted party upon the same terms and conditions as when originally issued.[22] The assignee has the same rights thereunder as the original insured, and in an action upon a policy is held to be subject to the same defenses as the assignor would have been.[23] Though the policy may provide that

[16] Kitts v. Massasoit Ins. Co., 56 Barb. (N. Y.) 177.

[17] Stout v. Insurance Co., 12 Iowa, 371; 79 Am. Dec. 539. See, also, secs. 560, 561, herein.

[18] City F. Ins. Co. v. Mark, 45 Ill. 482; Stimpson v. Monmouth etc. Ins. Co., 47 Me. 379; Barnes v. Union Ins. Co., 45 N. H. 21; Hooper v. Hudson River F. Ins. Co., 15 Barb. (N. Y.) 413; 17 N. Y. 424; Wolfe v. Security Ins. Co., 39 N. Y. 49; Buckley v. Garrett, 47 Pa. St. 204; Ellis v. Insurance Co., 32 Fed. Rep. 646.

[19] Cleveland v. Clapp, 5 Mass. 201.

[20] Shearman v. Niagara Ins. Co., 46 N. Y. 526.

[21] Eastman v. Carroll Co. Mut. Ins. Co., 45 Me. 307. See, however, City Ins. Co. v. Mark, 45 Ill. 482.

[22] Insurance Co. v. Garland, 108 Ill. 220; 9 Bradw. (Ill.) 571.

[23] Matthews v. General Ins. Co., 9 La. Ann. 591; Commonwealth v. National Ins. Co., 113 Mass. 514; Bidwell v. St. Louis etc. Ins. Co., 40 Mo. 42; Reed v. Windsor Mut. Ins. Co., 54 Vt. 413.

no assignment will be valid unless the consent of the company is given thereto, an objection that such provision has not been complied with can only be raised by the company.[24] The company cannot, after it has assented to an assignment, set up in defense to an action by the assignee fraud in the original application.[25] And if a policy contains a provision that it shall be void if assigned, before a loss without the consent of the insurer indorsed thereon, and the insurer places on it an indorsement making the loss, if any, payable to a third person, this indorsement operates as a ratification of a prior agreement of the insured to the same effect made without the previous consent of the insurer.[26] When an insurance company without reservation consents to the assignment of a policy, representing upon its face an unearned value, to the purchaser of the insured property, who in good faith pays value for such an assignment, the company will not be allowed to set up mental reservations or prior breaches, which were unknown to either party, in avoidance of its liability on the policy.[27]

§ **2309. Manner of Procuring Assent to Assignment —Policy.**—The by-laws of a mutual company may require that the transfer of the policy shall be ratified and approved by the directors. Under such by-law it is held that a formal vote of ratification is not necessary where it may be fairly presumed from the acts of their authorized agents or their own acquiescence.[28] And it has been held that, in the absence of any express provision making it the duty of some other officer

[24] Linkauf v. Coleman, 110 N. Y. 50; Insurance Co. v. Trask, 8 Phila. (Pa.) 32.

[25] Ellis v. Council Bluffs Ins. Co., 64 Iowa, 507.

[26] Gould v. Dwelling House Ins. Co., 134 Pa. St. 570; 19 Am. St. Rep. 517.

[27] Hall v. Niagara F. Ins. Co., 93 Mich. 184; 32 Am. St. Rep. 497.

[28] Dinan v. Hudson Ins. Co., 21 N. J. L. (4 Zab.) 171. In this case it was held that the fact that the secretary of the company had assented to the transfer as agent of the company, and indorsed it on the policy, was sufficient to bind the company. See, also, Phillips v. Merrimac Ins. Co., 10 Cush. (Mass.) 350; Farmers' Mut. Ins. Co. v. Taylor, 73 Pa. St. 342. See, however, Loring v. Manufacturers' Ins. Co., 8 Gray (Mass.), 28.

to assent to assignments, the assent of the secretary will bind the insurer, though the charter requires all policies to be signed by the president.[29] If the policy contains a provision that it shall be void in case of the alienation of the property, but that the directors may ratify an assignment within thirty days, it has been held that the policy is simply voidable, and not void, from the fact of alienation, and the directors may, after the expiration of thirty days, assent to such an assignment, and in case they do, they cannot, in the absence of mistake or fraud, recede from their action.[30] Where the policy provides that the assignee may, by making application to the directors of the company within a certain period of time, procure the assent of the company to the assignment, it cannot refuse its consent without just cause.[31] Though the clause in the policy makes an assignment without consent void, the agent of the company may, by an oral agreement that the policy shall remain in force, bind the company until it has certified its consent to the assignment.[32] The manner prescribed in the policy of procuring consent must generally be complied with, unless circumstances show a waiver by the company of such mode, or unless the company is estopped by acts of its duly authorized agent to set up the breach of such conditions.

§ **2310. Notice of Assignment—Fire—Marine.**—If the assignment of a marine policy does not vary the risk insured against, it has been held, in the absence of any provision as to notice to the insurer, that notice is not necessary.[33] A different rule would prevail, however, in the assignment of fire policies. Here, as has been stated,[34] the consent of the insurer, though the policy may contain no provision forbidding assignment, has generally been held necessary to render the

[29] New England Ins. Co. v. De Wolf, 8 Pick. (Mass.) 56.

[30] Grant v. Eliot & Kitterly Mut. F. Ins. Co., 75 Me. 196.

[31] Boynton v. Farmers' Ins. Co., 43 Vt. 256; 5 Am. Rep. 276.

[32] Illinois Mut. Ins. Co. v. Stanton, 57 Ill. 354. See secs. 560, 561, herein.

[33] Earle v. Shaw, 1 Johns. Cas. (N. Y.) 314; 1 Am. Dec. 117.

[34] Mutual Prot. Ins. Co. v. Hamilton, 5 Sneed (Tenn.), 269.

assignment valid. Consequently, it would be necessary to notify the office of an assignment of a fire policy, in order to obtain its consent and to render the assignment of any validity. If the policy provides that in case of an assignment of the policy notice must be given to the insurers, such provision must, like the other provisions as to transfer of the policy, be complied with by the assignor or assignee.[35] An application to the insurer for consent to the assignment of the policy has been held a good notice under a provision requiring notice to be given.[36]

§ 2311. What Constitutes Equitable Assignment of Fire Policy.—Though an assignment of a right to the proceeds in a fire policy may not be a valid legal assignment of the policy, it may, however, operate as an equitable assignment, vesting in the assignee an equitable interest in the proceeds. An equitable assignment, the policy itself not being assigned, will not defeat the policy under the general clause forbidding an assignment thereof, unless it is specially prohibited by the terms of the contract.[37] The assignee of the interest of the vendor in a contract of a sale of real estate, by which the vendee agrees to keep the premises insured for the benefit of the vendor, is equitably entitled to the proceeds of a policy after loss to the extent of his assignor's interest, and the insurance company, with notice of such assignee's claim, is liable for his share of the proceeds, even if the whole amount has been paid over after such notice to the insured.[38] In the absence, however, of any knowledge of the company of the rights of an equitable assignee, the company is not bound, though such an assignment is good as between the immediate parties thereto. So in case of a loss occurring after the exe-

[35] McEvers v. Lawrence, 1 Hoff. (N. Y.) 172.

[36] Hooper v. Hudson River F. Ins. Co., 17 N. Y. 424.

[37] Bergson v. Builders' Ins. Co., 38 Cal. 541; New England Ins. Co. v. Wetmore, 32 Ill. 221; Wakefield v. Martin, 3 Mass. 558; Foster v. Equitable Mut. Ins. Co., 2 Gray (Mass.), 216; Hall v. Dorchester Mut. Ins. Co., 111 Mass. 53; 15 Am. Rep. 1; Cromwell v. Brooklyn F. Ins. Co., 44 N. Y. 42; 4 Am. Rep. 641; Gourdon v. Insurance Co. of North America, 3 Yeates (Pa.), 327.

[38] Cromwell v. Brooklyn F. Ins. Co., 44 N. Y. 42; 4 Am. Rep. 641.

cution of a contract of sale of insured property, but before delivery of the deed of the property, the vendor recovers from the company as trustee for the vendee, the latter being entitled to the money.[39]

§ **2312. Indorsements upon Policy.**—Where the policy provides that an assignment shall avoid it unless some officer of the company has approved of such assignment and indorsed the approval of consent on the policy, an indorsement of such approval and consent made by the president on a separate piece of paper, and attached by a wafer to the policy, has been held a sufficient indorsement.[40] An indorsement upon a policy, "pay under the within policy to J. S., or order," is only an order to pay the amount due to such person in case of loss, and is not an assignment within the clause avoiding the policy if assigned without the consent of the company.[41] Nor does an indorsement "in case of loss pay to ——," together with delivery of policy to the designated payee, constitute an assignment.[42]

§ **2313. Fraud in Making Assignment—In Procuring Assent thereto.**—If a company assents to an assignment of the policy on the false representation that the insured has parted with his interest in the property insured to the assignee of the policy, and such assignment is in reality in fraud of the creditors of the assignor, the liability of the company is held to be terminated under a clause rendering the policy void in case of misrepresentation of interest in the property.[43] Though the assignment is voidable if procured by fraud, the insurer may nevertheless, after knowledge of the same, by acts of his own waive the fraud. So the levying upon the receipt of assessments from the assignee after knowledge thereof is held to be a sufficient waiver of fraud.[44]

[39] Shotwell v. Jefferson Ins. Co., 5 Bosw. (N. Y.) 247; Reed v. Lukens, 44 Pa. St. 400; 84 Am. Dec. 421.

[40] Pennsylvania Ins. Co. v. Bowman, 44 Pa. St. 89.

[41] Minturn v. Manufacturers' Ins. Co., 10 Gray (Mass.), 50.

[42] Ross v. Waldo etc. Ins. Co., 52 Me. 187.

[43] Phœnix Ins. Co. v. Willis (Tex.), 6 S. W. Rep. 825.

[44] Cumberland etc. Ins. Co. v. Mitchell, 46 Pa. St. 374.

§ **2314. Assignment to Mortgagee.**—The direction on the policy to pay to the mortgagee is not an assignment of the policy. Its legal effect is that of a direction in advance as to the mode of payment, which when made is performance in the manner agreed to by the insured. Under such a direction, if assented to by the insurer, the person in whose favor the appointment is made acquires equitable rights, which the insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished.[45] It is, as it was before the insertion of this clause, a contract of indemnity to the mortgagor, being an insurance upon his interest, and is not a contract of indemnity to the mortgagee. The latter's right of recovery may be defeated by subsequent acts of the mortgagor prior to the loss.[46] If, however, the policy is assigned to the mortgagee, and he gives a new premium note therefor and contracts to pay all future assessments on the policy, agreeing that there shall exist the same lien upon the policy for the payment of assessments as before, this constitutes, it is held, a new contract between the insurer and the mortgagee, and as such it cannot be affected by subsequent acts of the mortgagor.[47] If a debtor at or immediately after execution or assignment of a mortgage on his property to a creditor transfers to him a policy of insurance against fire on the mortgaged premises, though nothing be expressed at the time, or it is transferred as collateral security generally, it is a conclusion of law that the policy is to be held by the creditor as collateral security for the mortgage, and it requires an ex-

[45] Martin v. Franklin F. Ins. Co., 38 N. J. 140; 20 Am. Rep. 372; Franklin Sav. Inst. v. Central Mut. F. Ins. Co., 119 Mass. 240; Grosvenor v. Atlantic F. Ins. Co., 5 Duer (N. Y.), 517. As to assignment to mortgagee of thing insured, see Deering's Annot. Civ. Code Cal., sec. 2541.

[46] Illinois Mut. Ins. Co. v. Fix, 53 Ill. 151; Continental Ins. Co. v. Hulman, 92 Ill. 145; Hale v. Mechanics' Mut. Ins. Co., 6 Gray (Mass.), 169; Brunswick Sav. Inst. v. Commercial etc. Ins. Co., 68 Me. 313; McCluskey v. Providence Ins. Co., 126 Mass, 306; Griswold v. American Cent. Ins. Co., 1 Mo. App. 97; affirmed, 9 Ins. L. J. 254; Baldwin v. Phœnix Ins. Co. (N. H.), 10 Ins. L. J. 34; Martin v. Franklin Ins. Co., 9 Vroom (N. J.), 140; Grosvenor v. Atlantic F. Ins. Co., 17 N. Y. 391; State Mut. F. Ins. Co. v. Roberts, 31 Pa. St. 438; Bates v. Equitable Mut. Ins. Co., 10 Wall. (U. S.) 33.

[47] Foster v. Equitable Mut. Ins. Co., 2 Gray (Mass.), 216.

press agreement to authorize the assignee to apply the insurance money, in case of loss, to any other debt or liability, and the jury should be so instructed.[48] Where a policy assigned to a mortgagee contains a clause that upon the request of either party the amount of loss shall be left to arbitrators, it has been held that the mortgagor and insurer cannot, where the mortgage is unpaid, submit the question for award without the consent of the mortgagee.[49] If the mortgagee, holding a policy issued to the mortgagor and by him assigned to the mortgagee, obtains a judgment upon the policy in case of loss, the mortgagor is held entitled to the benefit of such judgment where the mortgagee has foreclosed the mortgage.[50] Where the policy is made payable to a person as mortgagee, the insurer cannot terminate a contract of insurance prior to its designated term without notice to the mortgagee, and, in the absence of a waiver of repayment, a tender of a ratable proportion of the premium.[51]

§ 2315. **Assignment of Fire Policy as Collateral.**—A provision of the policy making it void in case of an assignment without the company's assent does not embrace a transfer by way of collateral security for a debt.[52] If, however, the policy expressly provides that it shall be void in case of an assignment of the entire interest, or of any interest whatever under the policy, a transfer by way of collateral security is within such prohibition, and renders it void.[53] So also a condition expressly forbidding the assignment or transfer of a policy as collateral security will prevent the person holding the same as collateral from maintaining an action thereon.[54] If after

[48] Buckley v. Garrett, 60 Pa. St. 333; 100 Am. Dec. 564.

[49] Bergmann v. Commercial Union Assur. Co., 92 Ky. 494; 18 S. W. Rep. 122; Brown v. Roger Williams Ins. Co., 5 R. I. 394.

[50] Robert v. Insurance Co., 17 Wend. (N. Y.) 631.

[51] Lattin v. Royal Ins. Co., 45 N. J. L. 453.

[52] Griffey v. New York Cent. Ins. Co., 100 N. Y. 417; 53 Am. Dec. 202, Earl, J., dissenting; Tine v. Manhattan F. Ins. Co., 26 Fed. Rep. 83.

[53] Ferree v. Oxford F. Ins. Co., 8 Phila. (Pa.) 512. See Lynde v. Newark F. Ins. Co., 139 Mass. 57.

[54] Lynde v. Newark F. Ins. Co., 139 Mass. 57.

the assignment of the policy as collateral a loss occurs, the assignee will have an equitable lien upon the proceeds of the policy as against the assignor or persons claiming under him, though the assignee may have no interest in the property insured and the consent of the insurer to the assignment has never been obtained.[55] The right of a person holding the policy as collateral is merely a defeasible one, of which he is devested by the payment of the debt.[56] Where a policy was assigned "as collateral security only first to A, then to B and assigns," A and B holding the first and second mortgages, respectively, the assignment was held to give A and B a joint right of action, and it was also held that the amount recovered should be applied to the payment of A's mortgage first and then to B's.[57] The assignee of a policy as collateral security for a debt is held subject to all defenses available against the assignor.[58] The insurers may set up in defense the fact that the policy is violated by the transfer as collateral security, but in such a case they must show that it was in fact so transferred, as the mere possession of the policy by another than the insured is not prima facie proof of a pledge.[59]

§ **2316. Assignment to Partner.**—If the policy contains a provision that the assignment of the same, or any interest therein, without the assent of the company indorsed thereon, avoids it, such a sale and the assignment by the retiring partner to his copartners, who continue the business, of his interest in the policy does not avoid it.[60] Where a policy of fire insurance conditioned not to be assignable without the

[55] Bibend v. Liverpool etc. Ins. Co., 30 Cal. 78; Wakefield v. Martin, 3 Mass. 558; Cromwell v. Brooklyn F. Ins. Co., 44 N. Y. 42.

[56] Robert v. Traders' Ins. Co., 17 Wend. (N. Y.) 631; 9 Wend. (N. Y.) 474.

[57] Marts v. Cumberland Mut. Ins. Co., 4 N. J. L. 478.

[58] East Texas F. Ins. Co. v. Coffee, 61 Tex. 287.

[59] Lazarus v. Commercial Ins. Co., 5 Pick. (Mass.) 76; People v. Beigler, Hill & D. (N. Y.) 133.

[60] West v. Citizens' Ins. Co., 27 Ohio St. 1; 22 Am. Rep. 294. See, also, Dermain v. Home Mut. Ins. Co., 26 La. Ann. 69; Wilson v. Genesee Mut. F. Ins. Co., 16 Barb. (N. Y.) 511; Hoffman v. Ætna Ins. Co., Rob. (N. Y.) 501; Texas Banking etc. Co. v. Cohen, 47 Tex. 406;

written consent of the insurer, and to be void in case of transfer by sale or otherwise without such consent, was issued to a partnership of three persons, and subsequently during the term one partner retired without assigning his interest in the policy, but selling his interest in the partnership to his copartners, who continued the business, a fire subsequently having destroyed the property insured, it was held that the two remaining copartners could recover on the policy.[61] The amount of the remaining partner's recovery in case of assignment is not limited to the extent of their interest before loss, but they may recover to the full extent of the loss.[62]

§ 2317. By-laws of Mutual Company as Affecting Assignment of Policy.—As we have stated the condition inserted in the policy of insurance as to the manner of making the assignment must, in the absence of a waiver of such condition, be strictly complied with. So any provision in the charter or by-laws of a mutual company stating certain things as requisite for a valid assignment must also be complied with where such charter and by-laws are made a part of the policy.[63] So where there is a provision in the by-laws that upon a transfer of the policy the assignee must give his note in place of that of the person originally insured; it is essential to the validity of the transfer that such note be given, and it is not a waiver of such requirement that the secretary indorses his consent to the assignment upon the policy where he retains the same until the new note is given.[64]

§ 2318. Rights of Creditor of Assignor Attaching Subsequently to Assignment Fire Policy.—An assignment of a policy of fire insurance before loss, with the consent of the company, to the vendee or mortgagee of the insured property,

26 Am. Rep. 298. But see Buckley v. Garrett, 47 Pa. St. 270; Hobbs v. Memphis Ins. Co., 1 Sneed (Tenn.), 444. See note at end of last chapter.

[61] Texas Banking etc. Co. v. Cohen, 47 Tex. 406; 26 Am. Rep. 298.

[62] West v. Citizens' Ins. Co., 27 Ohio St. 1; 22 Am. Rep. 294.

[63] Simeral v. Dubuque etc. Ins. Co., 18 Iowa, 319.

[64] Cranberry Mut. F. Ins. Co. v. Hawk (N. J.), 13 Cent. Rep. 107.

or as security for debt, is good as against subsequently attaching creditors.[65] And where the policy has been assigned to a mortgagee, a creditor attaching subsequently to such assignment cannot defeat it by any defects in the mortgage.[66] Where after a loss a written assignment of a fire policy has been made by the holder, and notice of such assignment served on the company, but no delivery of the policy made, it has been held to be a valid assignment, which a subsequent attaching creditor cannot defeat, and such assignment need not be recorded under a statutory requirement that, in case of the sale or mortgage of personal property, the transfer must be recorded where the vendor or mortgagor retains possession.[67]

§ 2319. Effect of Acts of Assignor upon Rights of Assignee—Generally.—If the property insured is sold and the policy assigned with the consent of the company, it constitutes a new contract between the purchaser of the property and the insurer, and the former is not affected by any acts of the assignor, and the company is estopped to deny its validity either for want of consideration or on the ground of ignorance.[68] But if the policy is merely assigned as collateral security, it would seem that the insurer might avail itself as a defense of any acts of the assignor in violation of the conditions in the policy. The contract is one of indemnity to the insured. By such an assignment no new party assumes any obligation to the company; no new consideration moves from the assignee to the insurer. The policy is merely assigned for security, the assignor, after the assignment, occupying the same relation to the insurer as before. It is his interest which is covered. The company, by consent to such an assignment, does not waive all rights to claim a forfeiture for violation of the express condition of a policy. They stand in the same relation as affecting the validity of the pol-

[65] Walters v. Washington Ins. Co., 1 Cole, 404; Glover v. Wells, 140 Ill. 102; 29 N. E. Rep. 680.

[66] Leinkauf v. Colman, 110 N. Y. 50; 17 N. E. Rep. 389.

[67] Aultman v. McConnell, 34 Fed. Rep. 724. See Iowa Code, sec. 1923, for the statute.

[68] Ellis v. Insurance Co., 32 Fed. Rep. 646.

icy as before, and any subsequent violation of conditions will defeat a recovery where no new consideration moves from the assignee to the insurer.[69] Under an assignment of this nature the assignee is subject to the same defenses as might have been made against the mortgagor.[70] It has been held, however, in a few cases that subsequent acts of the assignor will not defeat the policy where assigned with the consent of the company.[71]

§ 2320. Effect of Acts of Assignor upon Rights of Assignee Who is Mortgagee.—If a fire policy is assigned as collateral to a mortgage with the consent of the company, the assignee takes it subject to the conditions thereof, and no recovery can be had merely in consequence of the equities of the assignee if the assignor loses the right to recover by violating the terms of the contract.[72] So a subsequent conveyance of the property by the insured in violation of the conditions of the policy, which require the consent of the company, will forfeit the policy.[73] The mortgagee may, however, take

[69] Birdseye v. City F. Ins. Co., 26 Conn. 165; Home Mut. Ins. Co. v. Hauslein, 60 Ill. 521; Hale v. Mechanics' Mut. Ins. Co., 6 Gray (Mass.), 169; Young v. Eagle Ins. Co., 14 Gray (Mass.), 150; Warlasse v. Sussex Co. Mut. Ins. Co., 42 N. J. L. 203; Grosvenor v. Atlantic Ins. Co., 17 N. Y. 391; State Mut. Ins. Co. v. Roberts, 31 Pa. St. 438; Pupke v. Resolute F. Ins. Co., 17 Wis. 378; 84 Am. Dec. 754; Kanody v. Gore Dist. Mut. F. Ins. Co., 44 U. C. Rep. 261.

[70] Reed v. Windsor Co. Mut. F. Ins. Co., 54 Vt. 413.

[71] New England Ins. Co. v. Wetmore, 32 Ill. 221; Pollard v. Somerset etc. Ins. Co., 42 Me. 221; Boynton v. Clinton etc. Mut. Ins. Co., 16 Barb. (N. Y.) 254; Burton v. Gore Dist. Mut. F. Ins. Co., 12 Grant Ch. 156. See Grosvenor v. Atlantic Ins. Co., 17 N. Y. 391; Buffalo Steam Engine Works v. Sun Mut. Ins. Co., 17 N. Y. 461. But examine Charleston Ins. Co. v. Neve, 2 McMull. (S. C.) 237.

[72] Illinois Mut. F. Ins. Co. v. Fix, 53 Ill. 151; 5 Am. Rep. 38; Tomlinson v. Monmouth etc. Ins. Co., 47 Me. 232; Loring v. Manufacturers' Ins. Co., 6 Gray (Mass.), 28; Buffalo etc. Works v. Sun Mut. Ins. Co., 17 N. Y. 401; Grosvenor v. Atlantic Ins. Co., 17 N. Y. 391. These last two cases overrule Traders' Ins. Co. v. Roberts, 9 Wend. (N. Y.) 404; Viall v. Genesee Mut. Ins. Co., 19 Barb. (N. Y.) 440; Tillou v. Kingston Mut. Ins. Co., 5 N. Y. 405; 7 Barb. (N. Y.) 570.

[73] Home M. F. Ins. Co. v. Hauslein, 60 Ill. 521; Hale v. Insurance Co., 6 Gray (Mass.), 169; Swenson v. Sun etc. Ins. Co., 68 Tex. 461; 5 S. W. Rep. 60; Moulthrop v. Farmers' Ins. Co., 52 Vt. 123.

upon himself the payment of the premiums, and in such a case acts of the mortgagor will not defeat the policy.[74] So where there is an agreement when the policy is assigned "that the mortgagee shall pay any and all assessments upon the property, provided the original insured shall not pay the same on demand," subsequent acts of the mortgagor will not defeat a recovery on the policy in the interest of the mortgagee.[75] If a policy by its mortgage clause provides that it shall not, as to the interest of the mortgagee, be invalidated by any act on the part of the mortgagor or owner, the mortgagee may recover for a loss, though the mortgagor may have voluntarily destroyed the property.[76]

§ 2321. **Effect of Acts of Mortgagor after Loss upon Rights of Assignee.**—The mortgagor cannot after a loss has occurred, by any agreement with the insurer as to the amount due upon the policy, affect the rights of the mortgagee, who is assignee of the policy or designated payee in case of loss,[77] nor can he by an assignment of his claim against the company, or by any release given to the company, defeat the rights of such assignee or payee.[78]

§ 2322. **Legal Effect of Assignment after Loss.**—A policy of insurance is, after loss has happened, assignable like any other debt, although such policy contains a provision that it shall not be assignable without the consent of the company expressed by indorsement made thereon.[79] After a loss has occurred the right of the assured to the indemnity becomes a fixed and vested right. It is an obligation or debt due from the company to the assured, and as such is assignable, and is not within the clause requiring notice of the assignment of the policy to be given to the company. It is, however, subject

[74] Brannin v. Mercer Co. Ins. Co., 28 N. J. 92.

[75] Francis v. Butler Mut. F. Ins. Co., 7 R. I. 159. See, also, Foster v. Equitable Mut. F. Ins. Co., 2 Gray (Mass.), 216; Boynton v. Clinton etc. Mut. Ins. Co., 16 Barb. (N. Y.) 254.

[76] Hartford F. Ins. Co. v. Williams, 63 Fed. Rep. 925.

[77] Brown v. Hartford F. Ins. Co., 5 R. I. 394.

[78] Chowne v. Bayliss, 31 Beav. 351.

[79] Walters v. Washington Ins. Co., 1 Iowa, 404; 63 Am. Dec. 451.

to such claims, demands, or defenses as the insurer would be entitled to make against the original insured.[80] A provision in the policy prohibiting an assignment after a loss has occurred has been held to be void, as against public policy.[81] If, however, the property insured is transferred before loss, but the policy is not assigned therewith, it cannot be transferred after loss so as to give the purchaser any rights thereunder. The holder of the policy, having parted with his interest in the property, has no rights at the time of loss, and the loss having occurred, he has no claim or debt against the company to assign.[82] It is not necessary to transfer the claim in writing after loss to constitute a valid assignment; a parol assignment of the right of action will be sufficient to transfer the cause of action.[83] If an assignment is made before loss, but is not delivered until after loss, it will operate as an assignment after loss, since the assignment does not take effect until delivery.[84] Where after loss the insured places the policy in the hands of an attorney for collection, instructing him to

[80] Perry v. Merchants' Ins. Co., 25 Ala. 355; Carter v. Humboldt F. Ins. Co., 12 Iowa, 287; Real Estate Ins. Co. v. Cashow, 41 Md. 59; Matthews v. General Ins. Co., 9 La. Ann. 591; Wilson v. Hill, 3 Met. (Mass.) 66; Hall v. Dorchester Mut. F. Ins. Co., 111 Mass. 53; Roger Williams Ins. Co. v. Carrington, 43 Mich. 252; Bonenfant v. Insurance Co., 76 Mich. 654; Archer v. Merchants' etc. Ins. Co., 43 Mo. 434; Combe v. Shrewsbury Mut. F. Ins. Co., 32 N. J. Eq. 512; Brichta v. Lafayette Ins. Co., 2 Hall (N. Y.), 372; Carroll v. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402; 40 Barb. (N. Y.) 292; 1 Abb. App. (N. Y.) 316; Rogers v. Traders' Ins. Co., 6 Paige (N. Y.), 583; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460; Pennebaker v. Tomlinson, 1 Tenn. Ch. 598; Dogge v. Northwestern Ins. Co., 49 Wis. 501.

[81] West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Alkan v. New Hampshire F. Ins. Co., 53 Wis. 136. See, also, Spare v. Home Mut. Ins. Co., 9 Saw. (C. C.) 142; 17 Fed. Rep. 568; Goit v. Insurance Co., 25 Barb. (N. Y.) 189; Courtney v. Insurance Co., 28 Barb. (N. Y.) 116; Carroll v. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402. In Dey v. Poughkeepsie Ins. Co., 23 Barb. (N. Y.) 462, it was held that if the parties chose to insert such a provision in the policy, they must be bound by it, as the courts would not interfere. This case is, however, overruled by the cases just cited.

[82] Lynch v. Dalzell, 3 Brown Parl. C. 431.

[83] Bennett v. Maryland Ins. Co., 14 Blatchf. (C. C.) 422.

[84] Watertown F. Ins. Co. v. Grover etc. M. Co., 41 Mich. 131.

apply the proceeds in payment of the insured's debt to a third person, it is held that this is not an assignment to the creditor.[85] An order given to a creditor by the insured after loss directing the company to pay him the amount due on the policy makes him assignee of the cause of action, and, under a statute requiring actions to be brought by the real party in interest, the assignee is entitled to sue on the policy.[86]

§ **2323. Assignment of Void Policy.**—Where a policy is void in the hands of the assured by reason of misrepresentations, it will be equally void in the hands of an assignee, although the company assents to the assignment.[87] So if a person obtains insurance upon property which he has already conveyed to another, such policy is void in his hands, and the consent of the company to a conveyance of all his title and interest in the policy to the grantee will not create a valid, new, and independent contract between the company and the grantee.[88]

§ **2324. Limitation Clauses — Assignment.**— Policies of fire insurance generally contain a clause forbidding an assignment of the policy without the consent of the insurer, and imposing a forfeiture for a violation of this restriction. A provision of this nature is enforceable in the courts,[89] as it is not an unlawful restraint upon the right to transfer property.[90] Such a provision will be strictly construed.[91] So a clause in a policy of insurance prohibiting assignment thereof without consent in writing of the company does not apply to a deposit of the policy by way of pledge, and such deposit

[85] Aultman v. McConnell, 34 Fed. Rep. 724.

[86] Spratley v. Hartford Ins. Co., 1 Dill. (C. C.) 392.

[87] Citizens' F. Ins. Co. v. Doll, 35 Md. 89; 6 Am. Rep. 360; Eastman v. Carroll Co. Mut. Ins. Co., 45 Me. 307.

[88] McCloskey v. Providence-Washington Ins. Co., 126 Mass. 306.

[89] Stolle v. Ætna F. Ins. Co., 10 W. Va. 546.

[90] Lazarus v. Commonwealth Ins. Co., 5 Pick. (Mass.) 76.

[91] Lazarus v. Commonwealth Ins. Co., 5 Pick. (Mass.) 76; Courtney v. New York etc. Ins. Co., 28 Barb. (N. Y.) 116; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573.

gives the creditor a lien on the proceeds of the policy, which lien is binding upon the underwriters, the assured, and all persons who with notice of such lien take an interest in the policy from the assured.[92]

§ 2325. **Clause as to Assignment—Waiver of Breach thereof—Forfeiture.**—A condition in a policy that no assignment can be made without the consent of the company may be waived, and the company thus prevented from setting up in defense breach of such condition.[93] A clause of this nature rendering the policy void in case certain conditions as to the manner of making the assignment are not complied with is for the benefit of the insurers. They may insist upon a forfeiture or not as they may desire, and though the conditions as to assignment may be clearly violated, still if the assurers desire, they may elect to waive the violations of such conditions and treat the policy as a valid subsisting contract of insurance. Where a policy of insurance provided that it should be void in case of assignment before loss without the consent of the company indorsed thereon, and the secretary of the company told the assured that he could assign the policy without such consent, it was held that this waived the condition.[94] If a policy is renewed by an agent of the company with knowledge that it has been assigned, the breach of condition is waived by the renewal.[95] Though the policy may become suspended under the by-laws for nonpayment of an assessment, if the company assents to an assignment of the policy thereafter, such act on its part is held to be a waiver of its right to insist on the objection,[96] but where the agent of the assignee had knowledge of a forfeiture, it was held that the consent of the company did not constitute a waiver.[97] If

[92] Ellis v. Kreutzinger, 27 Mo. 311; 72 Am. Dec. 270. See, also, Griffey v. New York Cent. Ins. Co., 30 Hun (N. Y.), 299; 100 N. Y. 417.

[93] City etc. Ins. Co. v. Mark, 45 Ill. 482; Wheeling Ins. Co. v. Morrison, 11 Leigh (Va.), 454; Pratt v. New York Cent. Ins. Co., 55 N. Y. 505.

[94] Stolle v. Ætna F. & M. Ins. Co., 10 W. Va. 546; 27 Am. Rep. 593.

[95] Bilson v. Manufacturers' Ins. Co., 7 Am. L. Reg. 661.

[96] Hale v. U. M. F. Ins. Co., 32 N. H. 295.

[97] Fire Assn. of Philadelphia v. Flourney, 84 Tex. 632; 19 S. W. Rep. 793.

a policy is conditioned to be void where assigned without indorsement of the company's assent thereon, and it is assigned, but several days thereafter the company indorses its consent, the forfeiture is thereby waived.[98]

§ **2326. Assignment of Life Policies—Generally.**—The rule that fire policies cannot be assigned without the consent of the insurer does not control in the assignment of policies of life insurance.[99] Under the strict rules of common law laid down in the earlier cases policies of life insurance are not assignable at law so as to give the assignee any rights thereunder in a court of law, but equity recognized such an assignment, and would compel the assignor to permit the use of his name in an action to recover as trustee for the assignee.[100] Policies of life insurance have, however, under later decisions, been held to be governed by the principles controlling choses in action and assignable by indorsement and delivery, vesting the entire right in the assignee.[101] Such acts even have been held unnecessary to constitute a valid assignment. With the gradual extension of the principles as to assignment of choses in action, courts of law now recognize an assignment thereof to the extent of vesting the assignee with an equitable interest, and permitting him to recover for his own benefit in the name of his assignor. And this rule is now said to control as to the rights of the assignees of life policies.[102] The assignment of a life policy need not be in writing to be valid;[103] but it is governed by the rules applicable to ordinary simple written contracts. A policy issued to

[98] Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460; 2 Am. St. Rep. 686; 12 Atl. Rep. 668.

[99] New York L. Ins. Co. v. Flack, 3 Md. 341; 56 Am. Dec. 742; Mutual Prot. Ins. Co. v. Hamilton, 5 Sneed (Tenn.), 269. See secs. 916, 918, herein.

[100] Wright v. Wright, 1 Ves. Jr. 409.

[101] Harley v. Heist, 86 Ind. 196; 44 Am. Rep. 285; Bushnell v. Bushnell, 92 Ind. 103; New York L. Ins. Co. v. Flack, 3 Md. 341; 56 Am. Dec. 742; Palmer v. Merrill, 6 Cush. (Mass.) 282. See secs. 914, 918, herein.

[102] Palmer v. Merrill, 6 Cush. (Mass.) 282, per Shaw, C. J.

[103] Macauley v. Central Nat. Bank, 27 S. C. 215; 3 S. E. Rep. 193.

a person in his own name, payable to his representatives, is assignable by him with effect to enable the assignee on the death of the insured to recover the sum named in the policy, whether he has paid a full consideration therefor or not.[104] The assignee of a life policy takes it subject to such defenses as existed in the hands of the assignor when it was assigned.[105] We have already discussed the question of the necessity of an insurable interest in the assignee of life insurance policies, and refer to those sections.[106]

§ 2327. **No Assignment by Insured where Interest in Policy has Vested in Beneficiary.**—The insured, where the policy is made payable to one, the interest having become vested in the beneficiary, cannot thereafter assign the policy to another so as to defeat the rights of the beneficiary first named, unless he consents thereto. No action will lie to compel the performance of an agreement to make such an assignment.[107]

§ 2328. **No Assignment if Policy Forbids.**—There can be no assignment of a life insurance policy if the policy by its terms expressly forbids the same.[108]

§ 2329. **Notice of Assignment—Life Policy.**—In life insurance the same principles as to notice of assignment do not control as in the case of fire insurance. In life insurance where there is no provision in the policy as to notice of an assignment of the policy, or as to the consent of the insurer being necessary thereto, it may be assigned without any notice of such act being given to the company.[109] And such assignment is good as between assignor and assignee, but it has

[104] St. John v. American Mut. L. Ins. Co., 13 N. Y. 31; 64 Am. Dec. 529.

[105] Dorman v. Borradaile, 10 Beav. 335.

[106] See secs. 914-19, herein.

[107] Potter v. Speilman, 117 Mass. 322. See chapters on beneficiaries. herein, as to change of beneficiary.

[108] Unity M. L. Ins. Co. v. Dugan, 118 Mass. 219.

[109] New York L. Ins. Co. v. Flack, 3 Md. 341; 56 Am. Dec. 742. See secs. 914-16, herein.

been held that it is necessary to give notice to the company in order to constitute an assignment valid as against a subsequent assignee, and free from acts of an assignor as to surrender of the policy to the office.[110] In Mutual Protective Insurance Company v. Hamilton[111] the court said: "The assent of the assurer to the assignment of the policy or notice of such assignment is not indispensable in order to entitle the assignee of the policy to recover the money from the insurer. We are of the opinion, therefore, that as between the insurer and the assignee of the life policy notice of assignment is not required to complete the right of the latter to receive the insurance money from the former. Upon this principle, as it seems to us, the right of the assignee must be held to be perfect, in a case like the present, by force of the assignment alone." The policy may, however, provide that notice must be given to the company, and in such a case the provision should be complied with to render the assignment a valid one.[112] Noncompliance therewith will not, however, render the policy void, unless it is so stipulated by express words.[113] The policy may simply provide that in case of assignment notice is to be given to the company, not specifying any particular time within which it shall be given. Under such a provision notice of assignment of an insurance policy is sufficiently early when given two days subsequent to the assignment, but after the death of the assured.[114]

§ **2330. What is Sufficient Notice—Life.**—No special form or mode is necessary to constitute a sufficient notice. A notice to the company in any form or to any agent of the company authorized to receive notice is good,[115] except where the agent has an interest in the policy.[116] If the policy does not require notice to be in writing, a verbal notice is suffi-

[110] Stocks v. Dobson, 17 Jur. 223-539.
[111] 5 Sneed (Tenn.), 269.
[112] Stevens v. Warren, 101 Mass. 564.
[113] Marcus v. St. Louis Ins. Co., 68 N. Y. 625.
[114] New York L. Ins. Co. v. Flack, 3 Md. 341; 56 Am. Dec. 742.
[115] Gale v. Lewis, 9 Q. B. 730.
[116] Brown v. Savage, 4 Drew. 1020.

cient.[117] Though no special form of words is necessary to constitute a sufficient notice, still the words used and the manner of their use must be such as would necessarily convey the knowledge to the insurers. A mere casual and incidental mention of the fact of assignment to an agent or officer of the company, or in a casual conversation, has been held insufficient as against a subsequent assignee.[118]

§ 2331. Assignment of Life Policy—Consent.—Life policies may expressly provide that they are not assignable without the consent of the company issuing them, and in such a case the provision must be complied with the same as when inserted in any other policy of insurance, to give the assignee any right thereunder as against the company.[119] Where a mutual company, the object of which is to protect the families of the insured members, issues a policy forbidding assignment without consent of the company, it is held that the fact that the company has received assessments from the assignee since insured's death is no waiver of the breach of the condition.[120]

§ 2332. Delivery of Assignment of Life Policy.—Delivery of an assignment of a life insurance policy is sufficient to vest title in the assignee, and is good against all but the creditors of the assignor when made by the assignor to the representative of the assignee.[121] It is not necessary to constitute a good delivery that the policy be delivered to the assignee. A delivery to a third party as trustee for the assignee will be sufficient.[122] Delivery of the policy to the assignee has, however, been held unnecessary to constitute a valid assignment, in the absence of fraud, if it appears that an assign-

[117] Wells v. Archer, 10 Serg. & R. (Pa.) 412; North British Assur. Co. v. Hallett, 11 Jur., N. S., 1263; s. c., 9 Week. Rep. 880.

[118] Edwards v. Scott, 2 Scott (N. H.), 266; Ex parte Stright, 2 Deac. & Chit. 314; Edwards v. Martin, 1 L. R. Cas. 122.

[119] Unity L. Ins. Co. v. Dugan, 118 Mass. 219.

[120] National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111.

[121] New York L. Ins. Co. v. Flack, 3 Md. 341; 56 Am. Dec. 742.

[122] Jones v. Consolidated Ins. Co., 26 Beav. 256; Lemon v. Phœnix Ins. Co., 38 Conn. 294; Estate of Trough, 8 Phila. (Pa.) 214.

ment was in fact made, or where the assignee has after the assignment paid all the premiums due upon the policy. So where the assignee left the policy in the possession of the assignor, it was held that, in the absence of fraud, he was entitled to the benefits of the policy, and that delivery was not necessary.[123]

§ **2333. Possession of Policy—Life.**—Possession of a policy of life insurance is not conclusive proof of the right of the holder to recover the money due on the policy. It is, however, prima facie evidence that the person holding it has a title to the same, and consequently a right in the proceeds. But it is only prima facie, as the contract is not a negotiable one, and the claim to the money due thereon may be assigned by agreement outside of the policy.[124] Where the person procuring insurance retains possession of the policy, he may, if he desires, change the beneficiary named therein and designate another as beneficiary.[125]

§ **2334. Assignment of Mutual Benefit Certificate.**—The right of the holder of a mutual benefit certificate to assign the same is dependent upon the by-laws, charter, or articles of association of the society issuing the certificate. The large majority of these societies are founded for the purpose of protecting persons standing in a certain relation to the insured member. Where the charter and by-laws designate the classes for whose benefit certificates of insurance are to be issued, a member cannot procure a certificate of insurance therein and prior to the death of a member assign the certificate to a person not within the designated class. Nor can the beneficiary so assign it.[126] Where, however, the laws of the so-

[123] Neale v. Molineaux, 1 Car. & K. 672; Scott v. Dickson, 108 Pa. St. 6; 56 Am. Rep. 192. But see Dexter Sav. Bank v. Copeland, 77 Me. 263; Ballou v. Giles, 50 Wis. 614.

[124] Wood v. Phœnix Ins. Co., 22 La. Ann. 677.

[125] Lemon v. Phœnix Ins. Co., 38 Conn. 301. See chapters on beneficiaries, herein.

[126] Bayse v. Adams, 81 Ky. 368. For a consideration of the question of change of beneficiary see chapter on beneficiaries, herein.

ciety are permissive of an assignment of the certificate, it may be assigned subject to the manner prescribed in the rules and by-laws.[127] It has been held where the certificate provided that "this certificate may be assigned, transferred, or set over by and with the consent of the association," that such provision only authorized the assignment by the beneficiary, and not the original insured.[128] An assignment of a mutual benefit certificate by the beneficiary named therein, no consideration being given, has been held to operate as a gift, and cannot be subsequently defeated by the beneficiary on the ground of want of consideration where it does not appear that there was fraud, duress, or undue influence.[129] An assignment as collateral security will not vest any right in the assignee where the beneficiary is named in the certificate and the charter provides that the certificates shall be for the benefit of a certain class, which includes the beneficiary named and not the assignee.[130] If a benefit certificate provides that the charter and by-laws are a part thereof, the assignee is bound by such provision.[131] Where the by-laws of a mutual benefit society permit a change of beneficiary, but prescribe the manner in which it may be done, there must be a compliance therewith to constitute a valid change. So where the certificate named the wife as beneficiary, and the husband, after the issue of such certificate, executed a paper assigning the policy as collateral security to a creditor, but failed to comply with the rules of the society in regard to making the assignment, and the company had no notice thereof until after the death of the insured, it was held that the creditor had no rights in the certificate, and that the widow was entitled to the proceeds.[132]

§ 2335. Fraud in Procuring or Making Assignment of Life Policy.—If by fraud or undue influence a benefi-

[127] Jackson v. Anderson (Ky.), 4 S. W. Rep. 326.

[128] Block v. Valley Mut. Ins. Co. (Ark.), 12 S. W. Rep. 477.

[129] Gray v. Northwestern Mas. Aid Assn. (Iowa S. C. 1891), 50 N. W. Rep. 27; Connecticut Mut. L. Ins. Co. v. Ryan, 8 Mo. App. 535.

[130] Dietrich v. Madison Relief Assn., 45 Wis. 79.

[131] Miller v. Assurance Co., 42 N. J. Eq. 459; 7 Atl. Rep. 894.

[132] Hotel Men's Mut. B. Assn. v. Brown, 33 Fed. Rep. 11. See chapters herein on beneficiaries.

ciary under a life policy is induced to make an assignment of such beneficial interest in the policy, the assignment may be avoided.[133] So where a husband fraudulently procured his wife's signature to an assignment of certain policies of life insurance in which she was named as beneficiary, the assignment was held invalid.[134] Where a husband procured insurance upon his life for the benefit of his wife, and delivered to her the policy, and afterward, without consideration and without any design to part with her property therein, but by the undue influence and control of her husband, she was induced to execute an assignment of the policy, without any knowledge of the purpose or purport, to a third person, who assigned it to a fourth, and these assignees paid the premiums, it was held in an action on the policy wherein the wife was made a party by order of interpleader that she was entitled to the amount of the insurance, independent of the question whether the policy was assignable under the statute.[135] Fraud on the part of the assignee will vitiate an assignment procured by such means; as where the assignee knew of the dangerous illness of the insured, of which the assignor had no knowledge, and of which the assignee did not inform him, an assignment was held void.[136]

§ 2336. Absolute Assignment of Life Policy to Creditor—Agreement to Retain only Amount Due.—In many instances policies of insurance upon a debtor's life are assigned to creditors to secure such amount as may be due from insured to the creditor, the whole interest being transferred.[137] Under such an assignment, in the absence of any agreement as to the balance recovered over the amount of the debt, it has been held that the creditor was not merely limited to the

[133] Connecticut Mut. L. Ins. Co. v. Westervelt, 52 Conn. 586; Whitridge v. Barry, 42 Md. 140; Eadie v. Slimmon, 26 N. Y. 9; Barry v. Brune, 71 N. Y. 261; 8 Hun (N. Y.), 395; McCutcheon's Appeal, 99 Pa. St. 133.

[134] Mutual etc. B. L. Ins. Co. v. Wayne Sav. Bank, 68 Mich. 116; 35 N. W. Rep. 853.

[135] Fowler v. Butterly, 78 N. Y. 68; 34 Am. Rep. 507.

[136] Jones v. Keene, 2 Moody & R. 348.

[137] See sec. 954, herein.

amount of the debt, but could retain the entire amount of the policy where there did not appear to be such a disproportion between the debt and the amount of the policy as to render it a wagering transaction.[138] There may, however, be an agreement between the debtor and the creditor that the latter shall, after deducting such amount as he might be legally entitled to recover if there were no insurance, deliver the balance of the amount recovered to certain designated persons. So where the debtor made absolute assignment of all rights in the policy to a creditor, and the latter agreed that, in case the debtor died before payment of the debt had been made and the proceeds of the policy were paid to him, he would make such a settlement with the representatives of the debtor as the case might require, it was held that this was an authorization to the creditor to collect the money due on the policy in case the debtor died without having paid the debt, and that after deducting such amount as was due to him the creditor must deliver the balance to those entitled to the same.[139] Under an agreement of this nature other creditors of the insured have no rights to the fund remaining unless there is actual fraud or they are actually injured by the transaction.[140]

§ 2337. **Assignment of Life Policy as Collateral.**—A policy of life insurance may be assigned as collateral security, and it is not necessary to procure the insurer's consent thereto.[141] So where a resident of Illinois, who had insured his life in a Massachusetts company, the policy being conditioned to be void if assigned without consent of the insurer, delivered the policy as collateral security to the plaintiff, a resident of Massachusetts, it was held in an action by the assignee, he having been appointed ancillary administrator in Massachusetts, that the bringing of a suit by the principal adminis-

[138] Amick v. Bitler, 111 Ind. 578; 9 Week. Rep. 842; 12 N. E. Rep. 518; Ruth v. Katterman, 112 Pa. St. 351; Warnock v. Davis, 104 U. S. 775. See secs. 954, herein.

[139] Page v. Burnstine, 102 U. S. 664.

[140] Johnson v. Alexander, 125 Ind. 525; 9 L. R. Annot. 660; 25 N. E. Rep. 706.

[141] Helmitage v. Miller, 76 Ala. 183; 52 Am. Rep. 316.

trator in Illinois was no bar to the present action, and that the ancillary administrator was entitled to recover, as he represented the equitable interest and possessory right of the pledgee of the policy.[142] A wife who has obtained a policy upon her husband's life, payable to her or assigns, may assign the same as collateral security.[143] Where a debtor has made an assignment of a policy upon his life as collateral security for a debt, the assignee does not waive his rights in the policy, by reason of having procured an allowance of his claim against the estate, because he has assigned the policy without recourse to the administrator for collection.[144] A son may make a valid assignment of policies of insurance upon his own life as security for debts due from his father to the assignee.[145] A life policy issued to a creditor may be assigned by him as collateral security to one without insurable interest in the life insured, and the assignee may enforce payment of the policy, even though proof of interest is required by the terms of the policy.[146]

§ **2338. Assignment of Policy Payable to Executors, Administrators, or Assigns.**—The power of assignment of a life insurance policy is not limited by a provision to pay the sum secured to the "legal representatives," of the insured, but the provision is designed to apply only in case the latter should die without having previously assigned. So where the contract was with the assured, "his executor, administrator, and assigns," and at the bottom of the policy were the words, "N. B.—If assigned, notice to be given to the company," the policy was held assignable.[147] A policy made payable to the insured or his assigns at a certain specified time, or in case of his death before such time to his personal repre-

[142] Merrill v. New England Mut. L. Ins. Co., 103 Mass. 245; 4 Am. Rep. 548.

[143] Robinsin v. Mutual B. L. Ins. Co., 16 Blatchf. (C. C.) 194.

[144] Hight v. Taylor, 97 Ind. 392.

[145] Bensinger v. Watertown Bank, 67 Wis. 75; 58 Am. Rep. 848.

[146] Curtiss v. Ætna L. Ins. Co., 90 Cal. 245.

[147] New York L. Ins. Co. v. Flack, 3 Md. 341; 56 Am. Dec. 742. See, also, Winchester v. Stebbins, 16 Gray (82 Mass.), 52; St. John v. American Mut. L. Ins. Co., 13 N. Y. 31.

sentatives, is likewise assignable, though the insured die before the time specified for payment.[148]

§ **2339. Assignment of Policy to Trustees.**—Where a policy was assigned to trustees to hold in trust for the wife of the insured, it was held that though the trustees had become bankrupt, they were entitled to the proceeds of the policy, and not their assigns in bankruptcy.[149] Where a person assigned a policy upon his life for the benefit of his sister and her children, and delivered the assignment but not the policy, which he afterward surrendered for a consideration, it was held in an action by the trustee to have the value of the policy replaced that the assignment was a valid one, and the assured must give sufficient security for the entire value of the policy.[150]

§ **2340. Assignment of Policy Pro Tanto.**—An assignment of an insurance policy pro tanto, by order indorsed thereon directing the insurers to pay a part of the insurance money to the assignee, the policy being retained in the possession of the assured, is not valid and effectual, though notice thereof is given to the insurers.[151]

§ **2341. Effect of Bankruptcy upon Policy on Life of Bankrupt.** — Where a policy is issued upon the life of a person in his own name, and he thereafter makes an assignment for the benefit of his creditors, it has generally been held that the policy passes to the assignees in bankruptcy, unless there has been a prior valid assignment, and such a policy, it has been held, will pass to the assignees in bankruptcy where the policy has been deposited as security for a debt, no notice being given to the insurers of such deposit and the insured

[148] New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591.

[149] North British Ins. Co. v. Hallett, 7 Jur., N. S., 1263; 9 Week. Rep. 880.

[150] Fortescue v. Barnett, 3 Mylne & K. 36.

[151] Palmer v. Merrill, 6 Cush. (Mass.) 282; 52 Am. Dec. 782; Pedder v. Morely, 31 Beav. 159. But see Pomeroy v. Manhattan L. Ins. Co., 40 Ill. 398, where it was held that such an assignment would be protected in equity.

having retained control of the same.[152] Where a creditor insures the life of his debtor and afterward assigns for the benefit of his own creditors, but keeps the policy, which after that he transfers to a third person, the administrator of the insured cannot recover the amount from the transferee to whom it was paid on the ground that the first holder could transfer no title after this general assignment, for whether he could or not is no concern of the insured or his administrator.[153] Where a person procured two policies upon his life payable to his legal representatives, and shortly after made an assignment for the benefit of his creditors, informing them of the existence of these policies, to which they made no claim, as they considered them to be of no value, and the insured, after holding them about a year, surrendered them and procured new ones payable to his wife, and he afterward received his discharge in bankruptcy, it was held that his act in surrendering the policies was not fraudulent, there being no intention to defraud, and the policies being of no value as assets, and therefore creditors, whether those prior to his discharge or subsequent thereto, had no claim upon the policies.[154]

§ 2342. Rights of Company where Policy Assigned. Where a policy which provides that all sums due from the insured to the company are to be deducted before payment is assigned, the company consenting thereto and reserving its "rights as expressed in the policy," it is held that the insurer may deduct premium notes given by the assignor subsequent to such assignment where no fraudulent intent to defeat the assignment appears.[155]

§ 2343. Assignment by Husband to Wife of Life Policy.—A husband may assign a policy of insurance upon his

[152] Cook v. Black, 1 Hare, 390; 11 L. J. Ch. 268; Williams v. Thorp, 2 Sim. 257; West v. Reid, 2 Hare, 249; 12 L. J. Ch. 245; Edwards v. Martin, 1 L. R. Eq. 121; 13 L. T., N. S., 236.

[153] Shaak v. Meily, 20 Atl. Rep. 515. See, also, Hurlburt v. Hurlburt, 1 N. Y. S. 854.

[154] Barbour v. Connecticut M. L. Ins. Co., 61 Conn. 240; 23 Atl. Rep. 154; 21 Ins. L. J. 3.

[155] Wiggin v. Suffulk Ins. Co., 18 Pick. (Mass.) 145.

life to his wife in the absence of a prior assignment. If, however, he has assigned the policy to another by a prior assignment, the subsequent assignment to the wife will fail.[156] An assignment will likewise fail if in fraud of the creditors of the husband.[157] Where a statute permitted a father to insure his life for the benefit of a minor child, it was held that such statute was not permissive of an assignment by the father of a policy in his own name to his minor children, he being in debt at the time of the assignment.[158] A husband may by a parol assignment and delivery to the wife create such equitable rights in her as will be good against creditors, unless the assignment is intended to be in fraud of the creditors.[159] Where the husband has disposed by will of the proceeds of a policy of insurance on his life, but subsequently to the making of his will assigns the policy to his wife, who pays the assessments thereon, it is held that she may recover in preference to persons named in the will.[160]

§ **2344. Assignment of Life Policy to Wife by Insolvent.**—Under a statute permitting a wife to insure her husband's life for her benefit and hold the proceeds as against his creditors—less premiums with interest paid by him, within the statutory period of limitation, with intent to defraud creditors, she may in like manner hold the proceeds of a policy which the husband has procured on his own life and assigned to her when insolvent.[161]

§ **2345. Right of Husband to Assign Policy Issued for Benefit of Wife or Children.**—A policy of insurance taken out by a husband upon his life for the benefit of his wife vests an interest in the wife which the insured cannot

[156] Chapman v. McIlwrath, 77 Mo. 38; 46 Am. Rep. 1; Roberts v. Phœnix Ins. Co., 120 U. S. 86.

[157] Appeal of Elliott's Exrs., 50 Pa. St. 75; 88 Am. Dec. 525.

[158] Friedman v. Fennel, 94 Ala. 570; 10 S. Rep. 649.

[159] Chapman v. McIlwrath, 77 Mo. 38; 46 Am. Rep. 1.

[160] Swift v. Railway Pass. etc. B. Assn., 96 Ill. 309 (one judge dissenting).

[161] Cole v. Marple, 98 Ill. 58; 38 Am. Rep. 83.

devest her of without her consent. And this rule also prevails where the policy is for the benefit of the wife and children of the insured.[162] If, however, after the wife's death the husband assigns the policy which was issued for the benefit of the wife, the assignee will become entitled to such interest as the husband would receive in the distribution of her estate. So where S. insured his life for the benefit of his wife, and paid the premiums until her death, he and two children surviving, and afterward he assigned his interest to H. as security, and H. paid the premium until S's death, it was held that on the wife's death one-third of the policy went to the husband and two-thirds to the children, and that H. could take only the one-third, but that he was entitled to be reimbursed for the premiums he had paid with interest.[163] As a general rule, if the husband assigns such a policy, the assignee has no rights in the same, but if he pays any premiums after the policy has been assigned to him, he will be entitled to recover the amount of premiums paid.[164] In a case in Indiana it has, however, been held that the assignee cannot even recover the amount of premiums paid except upon the clearest proof of fraud.[165]

§ 2346. Right of Guardian to Assign Policy Issued for Benefit of Ward.—A father who is acting as guardian for his children has no right to assign a policy of life insurance running to their benefit.[166]

[162] Goodrich v. Treat, 3 Colo. 408; 7 Ins. L. J. 269; Hubbard v. Stappe, 32 Ill. App. 541; Pence v. Makepeace, 65 Ind. 345; Robinson v. Duval, 79 Ky. 83; 42 Am. Rep. 208; Goslin v. Caldwell, 1 Lea (Tenn.), 454; 27 Am. Rep. 774; Pitcher v. New York L. Ins. Co., 33 La. Ann. 322; Unity Assn. v. Dugan, 118 Mass. 219; Ricker v. Charter Oak L. Ins. Co., 27 Minn. 193; 10 Ins. L. J. 143; Charter Oak L. Ins. Co. v. Brandt, 47 Mo. 419; Baker v. Young, 47 Mo. 453; De Jonge v. Goldsmith, 46 N. Y. Super. Ct. 131; Ferdon v. Danfield, 104 N. Y. 143; Connecticut Mut. L. Ins. Co. v. Van Campen, 32 N. Y. St. Rep. 1125; 11 N. Y. Supp. 103. See contra, Rison v. Wilkinson, 3 Sneed (Tenn.), 565.

[163] Harley v. Heist, 86 Ind. 196; 44 Am. Rep. 285.

[164] Pilcher v. New York L. Ins. Co., 33 La. Ann. 322; De Jonge v. Goldsmith, 46 N. Y. S. C. 131.

[165] Pence v. Makepeace, 65 Ind. 345.

[166] Pratt v. Globe Mut. L. Ins. Co. (Tenn. 1891), 17 S. W. Rep. 352.

§ 2347. Right of Wife to Assign a Policy on Life of Husband. — Statutes are in existence in many of the states providing that policies of insurance may be procured upon the life of a husband which shall inure to the sole use of a wife, or of the wife and children, free from all claims of creditors. The cases decided under these statutes in the different states are not entirely in accord with each other. In some of the states it has been held that such policies are not assignable by the wife, while in the decisions in other states there is the suggestion that where statutes are in existence giving the wife absolute control over her separate personal property, and she has paid the premiums upon the policy of insurance, she ought to be permitted to assign the same.[167] From

[167] In New York it has been held that such policies are not assignable, and that any assignment by the wife is void and of no effect: Eadie v. Slimmon, 26 N. Y. 9; 82 Am. Dec. 395, and note. This was decided under the statute of 1840. The reason controlling this case and the other which we shall hereafter cite as supporting the proposition is, that the statute is passed for the special protection of the widow and children of the insured, and that the spirit of the statute is not permissive of any assignment or transfer in any way of the policy. It is not passed for the benefit of the wife while the husband is living, so that she may assign the same, but it is to protect her during her widowhood, or to protect the orphan children after their father's death. See, also, in line with this principle, Smith v. Head, 75 Ga. 575; Knickerbocker L. Ins. Co. v. Meitz, 99 Mass. 157; Frank v. M. L. Ins. Co., 102 N. Y. 266, 267; 55 Am. Rep. 807; Wilson v. Laurence, 76 N. Y. 585; Whitehead v. New York L. Ins. Co., 33 Hun (N. Y.), 425; Frank v. Mutual L. Ins. Co., 12 Daly (N. Y.), 267; 2 Abb. Pr. (N. Y.) 385; Brunner v. Cohen, 6 Abb. N. C. (N. Y.) 409; 57 How. Pr. (N. Y.) 386; Barry v. Equitable L. Assur. Soc., 14 Abb. Pr., N. S. (N. Y.), 385, n.; Bell v. Cureton, 2 Mylne & K. 503; Pratt v. Globe Mut. L. Ins. Co. (Tenn., S., C. 1891), 17 S. W. Rep. 352. There are other cases, however, some of which hold expressly that in the absence of statutory prohibition, if the statute of the state gives a wife control over her property so that she may transfer the same, that under such power she should be held authorized to transfer a policy of insurance upon her husband's life: Collins v. Dawley, 4 Colo. 138; Pomeroy v. Manhattan L. Ins. Co., 40 Ill. 398; Norwood v. Gordon, 60 Ill. 253; Damion v. Pennsylvania Mut. L. Ins. Co., 99 Ind. 478; Charter Oak L. Ins. Co. v. Brandt, 47 Mo. 419; 4 Am. Rep. 328; Hermann v. Howard, 23 Wis. 108; Merril v. N. E. Mut. L. Ins. Co., 103 Mass. 245; Everett v. Oakley, 35 Ind. 188. The right to assign the policy in these cases is based upon the enabling statutes of the states in which the decisions have been rendered, giving a married woman the right to trans-

the consideration of the cases upon this subject we think the following principles may be deduced as being sustained by the

fer her sole and separate property and choses in action. Under these decisions such an assignment is not enforceable at law, but is held to constitute an equitable assignment of all rights of the wife in the policy, which the assignee may enforce in a court of equity. A Connecticut case (Connecticut Mut. L. Ins. Co. v. Burrows, 34 Conn. 305; 91 Am. Dec. 725), while it accepted the doctrine stated in New York as applicable to the state of facts before the court, seemed inclined, however, to modify the rule somewhat. The court said, referring to the case of Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395, and note; "The reasoning of the court goes so far as to hold that a policy of this description prior to the decease of the husband is absolutely and under all circumstances unassignable by the wife. That such should be the law under a policy, premiums on which were paid by the husband, certainly seems reasonable and just. While on the other hand, if the wife paid the premiums out of her separate estate, it is difficult to suggest a reason why she should not have the same power to assign her interest in the policy that she has to assign any other chose in action belonging to her." These points were not, however, expressly decided by the court, as the wife died before the husband, and the policy provided that in case of her death before the insured's, the policy should inure to the benefit of the children. In the absence of a provision in the policy or the statutes of the state as to any rights of children in such a policy, the principle as suggested in the Connecticut case (Connecticut Mut. L. Ins. Co. v. Burrows, 34 Conn. 305; 91 Am. Dec. 725) might prevail if the policy were made payable to the wife for her sole use. If, however, it clearly appears from the statute or the terms of the policy that the contract, in case of the death of the wife before the husband, is intended to be continued in favor of the children, these facts will constitute a material difference between the policy and ordinary choses in action. In such a case the ordinary rules of law applicable to choses in action will not apply so as to permit a married woman to assign a policy of insurance upon her husband's life, though empowered by statute to transfer her personal property: Eadie v. Slimmon, 26 N. Y. 9; 82 Am. Dec. 395. The words of the Connecticut court (Connecticut M. L. Ins. Co. v. Burrows, 34 Conn. 305; 91 Am. Dec. 725) are pertinent in this connection: "But it is suggested that the clause in the policy making it payable to the children 'is simply the indication of her purpose at that time to give the sum specified in the policy to them in case she deceased before her husband'; and again, that 'it must be held to be on her part an expressed, but unexecuted intention to give this sum to the children,' which purpose she could abandon at pleasure, and make a different disposition of the fund. The intention was not only expressed, but executed. The contract was complete, and the money, when due, was payable to the children without any further act on her part. But we do not regard the transaction as a gift. The charter of the company and the statute law required the policy to be made as it

weight of authority. In the absence of any provision in the policy, or of any statutory provision that the policy shall inure to the benefit of the children as well as the wife, it would seem that the wife, in those states where she is permitted to have absolute control over her sole and separate property, may assign a policy of insurance upon her husband's life issued for her sole benefit. If, however, it is clearly expressed in the policy to be for the benefit of the children as well as the wife, and it is the manifest intention, as declared in the statute, to make such a provision for the children, then they are vested with certain rights, of which they cannot be deprived by an assignment of the policy by the wife or husband.[168]

was, to protect it from the claims of creditors and the representative of the husband. The object of the legislature was to authorize a reasonable provision to be made for the family of the husband for the widow, if living, if not, for the children. Mrs. K., when she purchased this policy, doubtlessly intended to secure the benefits of this statute, not only for herself, in case she survived her husband, but for her children, in case she did not, and to that end she caused the policy to be made according to the requirements of the statute. Having done so, and the contract relations between the company and the children having thereby become fixed, it was not in her power to defeat the purpose of the legislature, in respect to the children and the manifest intention of the parties to the contract, by an assignment of the policy during the life of her husband." The court also, in this case, held that the instrument could not be considered testamentary in its nature, and therefore revocable by her. In a later Connecticut case (Phœnix M. L. Ins. Co. v. Dunham, 46 Conn. 79), where a policy upon a husband's life was issued for the benefit of the wife, or the children in case the wife died before her husband, it was held that the rights of the children were not affected by an assignment by her, but that such assignment would have been a valid one in case there had been no children. In Missouri, under the statute providing that a policy of life insurance for the benefit of a married woman shall inure to her use and benefit and that of her children, it has been held that the clause as to the children refers to the manner of descent and distribution, and does not vest in them any rights which an assignment of the policy by the wife would violate, her rights as to the control of the policy not being restrained in any way. The clause is held to mean that after the money has been reduced to possession by the wife, the proceeds shall go to the children at her decease; the object of the statute is simply to protect her: Baker v. Young, 47 Mo. 453; Connecticut Mut. L. Ins. Co. v. Ryan, 10 Ins. L. J. 72. These decisions are not in accord with any of the conclusions reached by any of the courts.

[168] In many of the states provisions have been made by statute or code for the protection of the interest of wife and children for whose

§ 2348. Assignment by Wife of Policy on Husband's Life—Cases Generally.—It has been held that the wife may assign a policy of insurance upon her husband's life where the purpose of such assignment is to procure the necessary means with which to keep the policy alive.[169] If the statute of the state in which the policy is issued prohibits an assignment of the policy by the wife, no assignment of her interest, though made in another state, will be deemed valid in the state where the policy was issued.[170] Where a policy was issued for the benefit of the wife in case she survived her husband, but if not to inure to the benefit of the children, and during the life of the husband she assigned the policy, to be held in trust for the children, it was held that such assignment was a valid one, and could not be defeated by a judgment

benefit policies have been issued. These laws are in substance the same in all the states. They provide that insurance may be procured upon the life of the husband for the benefit of the wife and children, and that such insurance policies shall be free from the claims of the creditors of the insured. It is also generally provided that in case premiums paid out of the estate of the husband exceed a certain amount, the excess with interest shall inure to the benefit of the creditors of the husband: Alabama, Code, 1886, vol. 1, sec. 2356; Connecticut, Rev. Stats., 1888, sec. 2799; Delaware, Rev. Code, 1874, c. 76, sec. 3; Florida, McClellan's Digest, 1881, sec. 22, p. 534; Illinois, Rev. Stats., 1891, sec. 54, p. 839; Kansas, Gen. Stats. 1889, vol. 1, sec. 3401; Kentucky, Pub. Acts, 1869-79, c. 645, secs. 30, 31; Maryland, Code Pub. Gen. Laws, 1888, vol. 1, sec. 117, p. 321, secs. 8-10, p. 803; Michigan, Gen. Stats. 1882, secs. 4238, 6300, 6301; Missouri, Rev. Stats. 1889, secs. 5851-54; New Hampshire, Gen. Laws, 1878, c. 175, sec. 1; New York, Rev. Stats., 8th ed., vol. 4, p. 2602, 2603; Ohio, Rev. Stats. 1890, vol. 1, secs. 3628, 3629; Oklahoma, Stats. 1891, sec. 19, p. 636; Pennsylvania, Brightly's Purdon's Digest, 1883, vol. 1, p. 914, sec. 54; Rhode Island, Pub. Stats. 1882, c. 166, sec. 21; South Carolina, Gen. Stats. 1882, sec. 1358; South Dakota, Laws 1891, c. 86, sec. 4; Tennessee, Code 1884, secs. 3335, 3336; Vermont, Rev. Laws, 1880, c. 86, secs. 2340-43; West Virginia, Code 1887, c. 66, secs. 5, 6; as amended by Acts 1891, p. 325, c. 109; Wisconsin, Sanborn & B. Annot. Stats. 1889, vol. 1, sec. 2347; as amended by Laws 1891, vol. 1, c. 376. It has been held in New York that the policy need not specially refer to such a statute or certain provision for the benefit of the children in case the wife dies before the husband, in order to bring it within the operation of the statute: Brunner v. Cohn, 58 How. Pr. (N. Y.) 239.

[169] Robinson v. Mutual B. Ins. Co., 16 Blatchf. (C. C.) 194; 20 Fed. Cas. 1036; 9 Ins. L. J. 23.

[170] Mutual L. Ins. Co. v. Terry, 62 How. Pr. (N. Y.) 325.

creditor.[171] Where a husband insured his life for the benefit of his wife, and in case she died before he did for the benefit of the children, it was held, she having died and also one of her children having died prior to his death, that the grandchild inherited such share in the proceeds of the policy as its parent would have been entitled to if living.[172] It has been held that where the policies were issued prior to the enactment of the statute, such statute did not apply to a policy payable to the wife "or her assigns." [173]

§ 2349. Assignment by Husband and Wife Jointly of Policy on Husband's Life—Joint Assignment by Husband, Wife and Children.—If the policy on the life of the husband is, either under a statute or by the express terms of the policy itself, for the benefit of the children as well as the wife, it cannot be assigned by the joint act of the husband and wife. The interest of the children has become a vested interest, of which they cannot be deprived. The general rules applicable to assignment by the wife alone of such a policy control here, and the decisions upon the right of the wife to assign the policy where the interests of the children are vested contain the same principles of law as involved in the joint act of the husband and wife.[174] It has been held, however, that where the children join in such an assignment, the assignee will be entitled to the proceeds in preference to the children.[175] In Missouri, a life insurance policy taken out by a husband on his own life for the benefit of his wife is assignable during his life, with her consent, as collateral security for his debts where there is no statute directly prohibiting it, and she is debarred by the assignment from recovering the proceeds of the policy.[176] In the Missouri case it appeared that the amount of premiums paid could not bring the case within the statute,

[171] Smillie v. Quinn, 25 Hun (N. Y.), 332; 90 N. Y. 492.

[172] Continental Ins. Co. v. Palmer, 42 Conn. 64; Connecticut Mut. L. Ins. Co. v. Baldwin, 15 R. I. 106; 23 Atl. Rep. 105; 14 Ins. L. J. 813.

[173] Robinson v. Mutual L. Ins. Co., 16 Blatchf. (C. C.) 194.

[174] Godfrey v. Nelson, 70 Ind. 50; Appeal of Brown, 125 Pa. St. 303; 17 Atl. Rep. 419.

[175] Ferdon v. Canfield, 39 Hun (N. Y.), 571, Daniels, J., dissenting.

[176] Charter Oak L. Ins. Co. v. Brandt, 47 Mo. 419; 4 Am. Rep. 328.

but in subsequent cases in that state the right of the wife to assign has been distinctly affirmed.[177] An indorsement in blank by a wife on a policy on her husband's life, in order that he may assign the same as collateral security for a certain loan, has been held valid. But if the husband use the indorsement for other purposes of assignment than that specified, it is not binding upon the wife, for any purpose other than that contemplated.[178] Where the insured, the wife, and children, including a minor child, joined in an assignment of a policy for the benefit of the wife and children, it was held that the assignee was entitled to the share of the wife and the three children who had reached their majority, but that the interest of the minor child was not transferred by such assignment, but was, however, subject to an equitable charge for one-fifth of the premium paid by the assignees with interest.[179] Where the wife insured the life of her husband and they joined in an assignment to a trustee for the benefit of the children, it was held that the wife could not question the trustee's right to the fund.[180] Under the New York laws[181] policies of insurance upon the lives of husbands for the benefit of their wives are "assignable by said wife with the written consent of her husband." Under the statute it is held that the joinder of the husband with the wife in making a written assignment constituted a sufficient consent of the husband. The fact that the children have a contingent interest dependent upon the death of the wife before the husband does not render an assignment void when made under this statute.[182] Under this statute it has also been held that endowment policies payable to the wife may be assigned by the husband and wife jointly.[183]

[177] Baker v. Young, 47 Mo. 453. See, also, Ford v. Travelers' Ins. Co. (S. C. D. C.), 13 Cent. Rep. 168; 16 Nash. L. Rep. 382; De Jonge v. Elliot, 23 N. J. Eq. 486; Archibald v. Mutual L. Ins. Co., 38 Wis. 542.

[178] Connecticut Mut. L. Ins. Co. v. Westervelt, 57 Conn. 586.

[179] Scobey v. Waters, 10 Lea (Tenn.), 551.

[180] Bond v. Insurance Co., 9 Phila. (Pa.) 149.

[181] Laws 1879, c. 248.

[182] Anderson v. Goldsmith, 103 N. Y. 617; 9 N. E. Rep. 495.

[183] Brunner v. Cohn, 56 N. Y. 11; 9 Daly (N. Y.), 36; 58 How. Pr. (N. Y.) 239; 6 Abb. N. C. (N. Y.) 409; 57 How. Pr. (N. Y.) 386.

§ 2350. Assignment and Transfer of Marine Policy —Generally. — The strict rules controlling the assignment of policies of fire insurance do not prevail in the assignment of marine policies. The latter is not so strictly a personal contract as is a fire policy. It is not, however, on the other hand, an incident of the property insured, so that it passes to a vendee or successive owners of the property without an express assignment of the policy. The fact that a person is the assignee of the insurable interest is not sufficient. He must also be assignee of the policy, or equitably entitled to the proceeds thereof under an agreement to assign by the insured. It is not necessary to procure the insurer's consent, unless required by the terms of the policy. The reason for the distinction between fire and marine policies is due to commercial necessities and convenience, and the fact, as we have stated above, that mere personal consideration is not such an important factor in marine policies. In England, in the last century policies were issued in blank to a great extent, and were transferable much the same as any negotiable instrument, although subsequent statutes were passed requiring the insertion, at the time of the issuance of the policy, of the signature of one or more of the persons interested.[184] The object of such statute was not to interfere with the transfer of the policy, but simply to prohibit the issuance of policies in blank.[185] It is generally considered that policies of marine insurance are assignable, unless an assignment is prohibited by the terms of the policy, but that they do not pass from the mere fact of the sale of the insured property.[186] The liability of the insurers is practically the same as if the assignee had in fact procured the insurance in his own name, though

[184] 25 Geo. III. c. 44; 28 Geo. III, c. 56.

[185] See cases decided under this act: Wolf v. Horncastle, 1 Bos. & P. 316; Devignier v. Stronson, 1 Bos. & P. 346, n.; Ebbsworth v. Alliance M. Ins. Co., L. R. 8 Com. P. 596.

[186] Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25; Spring v. South Carolina Ins. Co., 8 Wheat. (U. S.) 268; Wakefield v. Martin, 3 Mass. 558; Cleveland v. Clapp, 5 Mass. 201; Alexander v. Campbell, 41 N. J. 478; Earle v. Shaw, 1 Johns. (N. Y.) 314; 1 Am. Dec. 117; Rousset v. Insurance Co. of North America, 1 Binn. (Pa.) 429; Wells v. Archer, 10 Serg. & R. (Pa.) 432; Walker v. Fireman's Ins. Co., 2 Handy (Ohio),

he must sue in the name of his assignor, unless by statute permitted to sue in his own name.[187] When an agent procures an insurance in his own name for the benefit of "whom it may concern," a person to whom the policy is assigned takes it subject to such claims as exist against the assignor at the time of the assignment.[188] The terms of the policy itself or the statutes of a state may permit the assignor to maintain a suit in his own name. Where, however, he is not so authorized, he should, though his rights are equitable in their nature, bring an action in the name of his assignor in a court of law, and recover thereon.

§ 2351. **Assignment of Marine Policy where Assignor has Parted with Entire Interest in Property Insured.**—If the insured parts with his interest in the policy, but agrees with the vendee that he will act as trustee of the subject of insurance, it has been held that he will then hold the policy for the benefit of the assignee.[189] But if the insured not only parts with his interest in the policy, but also delivers to the vendee actual possession of the insured property, can the policy be also assigned, either at the time of the sale or by a subsequent assignment before the loss, so as to permit the assignee to recover thereon? Or does the policy become entirely inoperative from the moment of such sale, both in the hands of the vendor and the vendee? It has been said that the policy of insurance is strictly a personal contract, and that in case of an absolute sale and delivery of a subject of insurance it becomes inoperative, because the vendor has no longer any interest in the contract, and because the insurer did not contract with the vendee. This view is taken by Mr. Parsons.[190] That it is a personal contract is true. It is, however, clearly not

256; Powles v. Innes, 11 Mees. & W. 10; Motteaux v. London Assur. Co., 1 Atk. 547; Delaney v. Stoddard, 1 Tenn. 22; Crozier v. Phœnix Ins. Co., 2 Har. (N. B.) 200; Pellas v. Neptune Ins. Co., 5 C. P. D. 34; Lloyd v. Fleming, L. R. 72 B. C. 299-302. See sec. 904, herein.

[187] Insurance Co. of Pennsylvania v. Trask, 8 Phila. (Pa.) 32; Tuttle v. Beebe, 8 Johns. (N. Y.) 118.

[188] Waters v. Allen, 5 Hill (N. Y.), 421.

[189] Powles v. Inness, 11 Mees. & W. 10.

[190] 1 Parsons on Insurance, 56-58.

subject to the same stringent rules applicable to fire policies. Mere personal consideration is not the controlling element. The policy may in all other cases be assigned without the insurer's consent, unless it is expressly required by the terms of the contract. Necessities of trade and commerce and commercial usage have created a distinction between the rules applicable to fire and marine policies.[191] So from a consideration of this question it seems clear that where there has been an absolute sale and transfer of the property insured, the pol-

[191] Mr. Arnould says, in connection with the subject of assignment of marine policies (2 Arnould on Insurance, Perkins' ed. 1850, 1265): "If after the policy be effected, but before the loss, he assigns away his interest in the thing insured, he cannot sue on the policy except as trustee for the assignee, and that only in cases where the policy is handed over to him on the assignment, or there is an agreement that it shall be kept alive for his benefit." And Mr. Maclachlan says (1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 115): "An absolute sale and transfer by the party originally insured of all his interest in the insured property incapacitates him, or the party who has effected the insurance for him, from recovering on the policy on his account. Nor can he or the party who has so effected the policy sue thereon as trustee, unless there has been either an assignment of the policy, or something which the courts will consider as equivalent thereto, or evidence of an agreement between the vendor and vendee that the policy should be kept alive for the benefit of the latter." Mr. Duer also says (2 Duer on Insurance, ed. 1846, 55): "The purchaser may cover the risk he assumes by a new insurance, but has no claim to the benefit of a prior insurance not assigned to him." So Mr. Phillips says (1 Phillips on Insurance, 3d ed., 58): "Where the insured interest is assignable, whether in a marine, fire, or life insurance, the policy is assignable in equity to the assignee to whom the subject matter or interest thereby assured is assigned, provided it contains no provision to the contrary." From a consideration of the foregoing, we find Mr. Phillips declaring that the policy is assignable in such a case, while we have Mr. Arnould, Mr. Duer, and Mr. Maclachlan stating principles applicable to the assignment of marine policies, in which it may clearly be seen that it is asserted by these learned authors that marine policies in such a case are assignable, and in two cases in the United States the same view was evidently assumed to be law: Spring v. South Carolina Ins. Co., 8 Wheat. (U. S.) 268; Rousett v. Insurance Co. of North America, 1 Binn. (Pa.) 429. In Powles v. Innes, 11 Mees. & W. 10, Parke, J., said: "If the policy had been handed over with the bill of sale, or there had been an order to the broker to hand it over, the case would be different. Then the parties might sue as trustee for the purchaser." In this case there was an actual transfer of the property insured.

icy may at the same time be assigned to the vendee, so that a recovery may be had. While we find no cases expressly declaring that the policy may be so assigned aside from those already examined, yet we find many decisions in which such a rule is assumed to exist, and wherein the conclusions arrived at are evidently based upon such assumption.[192]

§ 2352. **Assignment of Marine Policy Subsequent to Absolute Sale and Transfer of Subject of Insurance.**—Another question arises in connection with that raised in the preceding section. Can the vendor, where there has been an absolute sale and transfer of the property insured without any assignment of the policy, subsequently assign the same so that a recovery may be had thereunder? Can the assignor by a subsequent possession of the insurable interest recover on the policy? To recover upon the policy there must be an interest in the insurance and in the property insured. The underwriter contracts for a certain length of time. If during this time the policy is inoperative, because there is no union of interests, the policy not passing by the mere sale of the property, and the vendor having no interest covered by the policy after an absolute sale and transfer, then no recovery can be had. The insurer suffers no damage from the suspension of the policy during that time. It is rather an advantage to him. Consequently, it would not seem that the underwriter could, in the absence of any stipulation in the policy forbidding such a transfer, claim that from the fact of a suspension of the liability the policy is thereby avoided, where it appears that the underwriter has not been prejudiced in any way by such transfer, and that the revival of the policy by the union of the interests would be simply a continuation of the

[192] Powles v. Innes, 11 Mees. & W. 10; Sparkes v. Marshall, 2 Bing. N. C. 774; 3 Scott, 172; Delany v. Stoddardt, 1 Term Rep. 22; Hibbert v. Carter, 1 Fed. Rep. 745; Dhegetoff v. London Assur. Co., Morely, 83, 10 Q. B.; North Eagle Oil Cake Co. v. Marine Ins. Co., L. R. 49; Earle v. Shaw, 1 Johns. Cas. (N. Y.) 313; Rogers v. Traders' Ins. Co., 6 Paige Ch. (N. Y.) 583; Insurance Co. v. Trask, 8 Phila. (Pa.) 32; Roussett v. Insurance Co. of North America, 7 Binn. (Pa.) 429; Gordon v. Insurance Co. of North America, 3 Yeates (Pa.), 327; Spring v. South Carolina Ins. Co., 8 Wheat. (U. S.) 268.

exact risk he assumed. We think that, under such circumstances, the policy would revive, and fully protect the interest of the originally insured upon the ownership of the property being again vested in him. It would seem, therefore, that the insurer would be liable for losses occurring after the revival of the policy by the union of the interest, but not for any occurring during the time the policy was suspended.[193] Consequently, such being the case, the original insured, though he has no interest in the property, still has an interest in the policy; therefore, it would follow that such interest would be assignable in equity to the vendee of the goods, and that the policy would revive exactly the same as if the union of interest was in the vendor. Mr. Phillips says, after considering this question: "I conclude, therefore, that though the subject may have been absolutely transferred pending the risk, and the risk may have been thus interrupted, it will revive by an assignment of the policy to the vendee of the subject, and cover subsequent losses, but not intermediate ones." [194]

§ **2353. Assignment of Marine Policy—Delivery to Assignee.**—Though delivery of the policy is not requisite to the validity of the assignment as between the assignor and assignee, yet if the assignee permits the assignor to retain possession, and the latter makes a subsequent assignment thereof to another person who accepts such assignment in good faith with no knowledge of a prior assignment, he will have a superior equity to that of the prior assignee.[195]

§ **2354. Notice of Assignment of Marine Policy.**—It is not necessary to render the assignment valid that notice thereof should be given to the insurer. The assignee should, however, for the better security of his own interests, and to prevent any setoff of claims against the assignor accruing subsequently to the assignment, notify the underwriters of the as-

[193] Howard v. Albany Ins. Co., 3 Denio (N. Y.), 301, per Bronson, J.; Carroll v. Boston M. Ins. Co., 8 Mass. Rep. 515; Power v. Ocean Ins. Co., 19 La. 28. See sec. 903, herein.

[194] 1 Phillips on Insurance, 3d ed., 64.

[195] Wells v. Ancher, 10 Serg. & R. (Pa.) 412.

signment to him. Notice being given, it is held that the rights of the assignee cannot in any way be prejudiced or defeated by subsequent acts of the assignor, and no setoff of any claims accruing prior thereto will be allowed where the underwriter has failed to give notice thereof to the assignee.[196] And where notice has been given, any subsequent release by the assignor will not be binding upon the assignee,[197] nor will payment to the assignor discharge the insurer.[198]

§ 2355. **Prohibition in Marine Policy as to Assignment.**—Though the assignment of a marine policy without the consent of the company is valid at common law, yet if the policy contains a provision forbidding assignment, and declaring that it shall be void if assigned, such a provision, like any other agreement or stipulation of the contract, is valid, and will be binding.[199] The deposit of the policy as collateral has, however, been held not to be in violation of such a provision where no actual assignment is made.[200] A provision in a policy forbidding assignment of the vessel does not prevent an assignment of the policy.[201]

§ 2356. **Rights of Insurers to Set-off against Assignee.**—An assignment of a policy assented to by the insurers by a memorandum reserving to themselves all rights expressed therein "regarding premium notes, debts," etc., where by the terms of the policy such assent is made necessary to an assignment, entitles the insurers to deduct from a loss payable to the assignee all premium notes and other debts then due them from the assignor, which according to the provisions of

[196] Lyon v. Sumers, 7 Conn. 399; Jones v. Witter, 13 Mass. 304; Johnson v. Bloodgood, 1 Johns. Cas. (N. Y.) 51; Weston v. Barker, 12 Johns. (N. Y.) 276; Winchester v. Hackley, 2 Cranch (U. S.), 342; Mandeville v. Welch, 1 Wheat. (U. S.) 233; 5 Wheat. (U. S.) 277. But see Wiggin v. American Ins. Co., 18 Pick. (Mass.) 158.

[197] Andrews v. Beecher, 1 Johns. Cas. (N. Y.) 411; Martin v. Hawks, 15 Johns. Cas. (N. Y.) 405.

[198] Wardell v. Eden, 2 Johns. Cas. (N. Y.) 258.

[199] Lazarus v. Com. Ins. Co., 5 Pick. (Mass.) 76.

[200] Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68; Insurance Co. of Pennsylvania v. Phœnix Ins. Co., 71 Pa. St. 31.

[201] Alexander v. Campbell, 41 L. J. Ch. 478; 27 L. T., N. S., 417.

the policy they might have deducted if there had been no assignment.[202] Where there has been an equitable assignment of a right to the proceeds in a policy of insurance, the insurer is, as a general rule, entitled to set off all claims due from insured, and which might have been entitled to set off against him if there had been no assignment. If, however, the insurer is called upon as to any claims against the insured, and does not disclose them, he is held estopped from claiming a setoff based on any such claims thereafter.[203] If the assured assigns his rights under the policy after a loss, the assignee of the claim takes it subject to the rights of setoff by the company of claims against the assignor.[204]

§ 2357. What Constitutes Assignment—Cases Generally. Where the policy has been assigned, and the assignment forwarded to the office of the company and accepted by it, a copy being kept filed at the office and the original returned and attached to the policy, and notice sent to the assignee of the assignment, this is held to vest the title in the assignee. A delivery to a third person to hold for the assignee will be sufficient, as such a delivery devests the assignor of such possession. It is not necessary to deliver the policy to the assignee or donee.[205] Under a clause in a policy providing that it shall be void, in case of suicide, unless it be in the hands of a bona fide assignee, it has been held that a deposit with a letter agreeing to assign will constitute a valid assignment.[206] An assignee of a life policy who reassigns a portion thereof to the insured, to whom he delivers the policy with the assignment attached thereto in such a manner that it can be easily removed, cannot recover the insurance, as against a bona fide assignee of a paid-up insurance issued by the company, on the

[202] Wiggin v. Suffolk Ins. Co., 18 Pick. (Mass.) 145; 29 Am. Dec. 576; Wiggin v. American Ins. Co., 18 Pick. (Mass.) 158.

[203] Baltimore Ins. Co. v. McFadon, 3 Har. & J. (Md.) 31; Rousett v. Insurance Co. of North America, 1 Binn. (Pa.) 429; Gourdon v. Insurance Co. of North America, 1 Binn. (Pa.) 430; 3 Yeates (Pa.), 327.

[204] Ancher v. Merchants' etc. Ins. Co., 43 Mo. 434.

[205] Hurlburt v. Hurlburt, 49 Hun (N. Y.), 189; 1 N. Y. S. 854.

[206] In re Styan, 1 Phill. Ch. 105. See, also, Moore v. Wooley, 4 El. & B. 243; s. c., 28 Eng. L. & Eq. 248; Cook v. Black, 1 Hare, 390.

surrender of the policy without notice of the former assignment.[207]

§ 2358. What is not an Assignment—Cases Generally. A delivery of a policy to an attorney after a loss, with the instructions to collect and apply the proceeds to the payment of a debt due to a third person from the insured, is not an assignment of the policy to the creditors.[208] The giving of a chattel mortgage is not an assignment of the policy, and is not in violation of a condition that the policy shall not be assigned without the consent of the company.[209] It has been held that an unexecuted parol or written agreement to assign does not constitute an assignment of the policy,[210] nor does a mere declaration in a letter where no delivery of the policy has been made.[211] An alienation of the property does not operate as an assignment of the policy,[212] though coupled with an agreement to assign.[213] The execution of an assignment, which is to be delivered only after the company has given its assent, which the policy requires does not operate as an assignment so as to in any way affect the rights of the parties.[214] Where an executor of an estate placed a policy of insurance on his own life among other papers of the estate in a box, together with a writing stating that the policy was as collateral for a deficiency due from him to the estate, and retained the box and papers in his possession, and upon the trial testified that he thus deposited the policy so that in case he died the estate might receive the benefit of the security, it was held that this did not constitute an assignment to the estate, or give it any lien which would defeat the rights of a creditor.[215] It has been held that where the policy does not expressly pro-

[207] Bridge v. Wheeler, 152 Mass. 343; 25 N. E. Rep. 612.

[208] Altman v. McConnell, 34 Fed. Rep. 724.

[209] Prows v. Ohio Ins. Co., 2 Cinc. (Ohio) 14.

[210] Sweat v. Monmouth Mut. F. Ins. Co., 50 Me. 96; Cromwell v. Brooklyn F. Ins. Co., 39 Barb. (N. Y.) 227; 44 N. Y. 42.

[211] In re Webb, 49 Cal. 541.

[212] Phillips v. Merrimac F. Ins. Co., 10 Cush. (Mass.) 250.

[213] Pearce v. Nashua Ins. Co., 50 N. H. 297; 9 Am. Rep. 235.

[214] Smith v. Monmouth etc. Ins. Co., 50 Me. 96.

[215] Falk v. Jones (N. J. Ch. C. 1892), 23 Atl. Rep. 813.

vide to the contrary, the owner of insured goods which are in transit may give the carrier the benefit of his policy, and that this action on his part will not be in violation of a provision in the policy forbidding a sale, assignment, pledge, or transfer of interest.[216]

[216] Jackson Co. v. Boylston Mut. Ins. Co., 139 Mass. 508; 52 Am. Rep. 728.

CHAPTER LII.

CHANGE OF VOYAGE—DEVIATION—LIBERTY CLAUSES.

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§ **2365. Description of the Voyage.**—The policy should describe the voyage by termini, or by specifying the extremes or places of beginning and termination, which are the terminus a quo and the terminus ad quem; the former being the place whence the ship is to depart, and the latter the place where she is to end the risk and discharge. In time policies the two extremes of the risk are designated by time when the risk attaches and terminates, and this is true whether the risk be on ship or goods. If a deviation under a voyage policy is intended, it should be provided for by apt and proper words. Sometimes the policy specifically prescribes the course of the voyage, which precludes following any other course, even though it be the usual one established by usage.[1] Although the fact that specific termini and certain intermediate ports are mentioned, this does not preclude stopping at intermediate ports other than those mentioned where such stopping is by the usage of trade usually permitted.[2] An insurance "from" a port must be referred to a sailing therefrom; while under a policy "at and from" the risk attaches in port. This form is peculiarly applicable to risks when effecting a policy from an outport, and is adopted at a home port when it is desired to protect the ship in port. The description of

[1] See on this last point, Eliot v. Wilson, 7 Brown Parl. C. 459; Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J.

[2] See McCall v. Sun Mut. Ins. Co., 66 N. Y. 506.

the voyage depends, however, largely upon the character of the risk and the voyage. It may be a direct voyage from port to port, or may consist of several passages, or be a trading voyage, or a liberty to call at intermediate ports may be given, or certain ports may be prohibited, or it may be an entire voyage out and home, although there are separate passages. We have, however, fully considered these points elsewhere under the several heads, to which they may be appropriately referred. The purpose for which a voyage is to be conducted, whether as a trading, fishing, or freighting voyage, is often mentioned in the policy. But this designation cannot vary or extend a description, route, or termini of the voyage when definitely specified in the policy, except some usage connected with the particular trade or adventure justifies such change.[3] In certain cases the description of the voyage must be construed with reference to the extent of port or ports and place or places designated, and also with reference to the sense or meaning which certain places have acquired by usage, which is their commercial sense or meaning, as opposed to their geographical sense.[4]

§ 2366. Distinction between Voyage of Ship and Voyage Insured.—A clear distinction exists between the voyage insured and the voyage of the ship. In voyage policies there are designated extremes, being the terminus a quo and the terminus ad quem. This is the voyage insured. The route that is taken to make this voyage is the voyage of the ship, but the route taken may not be identical with, and may differ from, that required by the voyage insured. It is then, nevertheless, the voyage of the ship, for it is the course actually sailed by the ship. In all voyages insured in the absence of usage or contrary stipulation, it is an implied binding condition that the ship will follow that usual and regular course which mercantile usage and custom has fixed upon as the saf-

[3] Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J. See Child v. Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

[4] See Robertson v. Clark, 1 Bing. 445; 8 Moore, 622. Chapters ix, xxxvii, xxxviii, herein.

est, most expeditious, and direct course to the place of destination, except a departure therefrom be warranted by necessity, or there is some permissive stipulation or other justifying excuse. If the departure from the usual prescribed course be not warranted by a reasonable and justifiable cause, the insurer is discharged, for the risk is changed and differs from that assumed under the contract. The assured has no right to substitute a different risk without consent of the insurer.[5]

§ 2367. Where Course of Voyage Insured is not Fixed by Mercantile Usage.—If the course of the voyage insured is not fixed by mercantile usage, the ship would nevertheless, by custom and usage, be obligated to reach the place of destination as soon and as safely as possible by the direct course, without being permitted to stop or deviate therefrom

[5] "The Ordonnance distingulshes the route from the voyage. It means to speak of the voyage insured and of the route which is proper to this voyage insured. The route may in several cases be changed or altered without the voyage insured being so, and reciprocally the voyage insured may be entirely broken up, although the vessel does not deviate from the route of the voyage indicated in the policy": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 4, p. 548. "The route is the way that one takes to make the voyage insured: est iter viaggi. . . . . The word 'iter' is ordinarily employed . . . . to designate the route and direction of the voyage insured, rather than to designate the voyage itself. The captain's duty is to reach the place of his destination as soon and as safely as possible. He is bound to follow the direct course, and to make sail recta navigatione without its being permitted to him to stop without necessity. . . . . The general rule then is, that the captain should follow the straight course, the customary route, and the most sure" : Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 5, p. 550. "The voyage insured (viaggium) is a transit at sea from the terminus a quo to the terminus ad quem in a prescribed course of navigation (iter viaggii), which is never set out in any policy, but virtually forms part of all policies, and is as binding upon the parties thereto as though it were minutely detailed. The voyage of the ship (iter navis) is the course of navigation on and in which the ship actually sails" : 1 Arnould on Marine Insurance, Perkins' ed. 1850, 339, *333, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 365, et seq. When the voyage contemplated by a policy is described by the places of beginning and ending, the voyage insured is one which conforms to the course of sailing fixed by mercantile usage between the places: Deering's Annot. Civ. Code Cal., sec. 2692. See Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J.; Classon v. Simonds, 6 Term Rep. 533, n.

without necessity or justifying excuse;[6] but in such case it would seem that the judgment of a master of ordinary skill and discretion must be relied on to determine what shall be the safest, most natural, direct, advantageous, and expeditious route. While this is not so expressly decided, yet such a rule would be in conformity with that which would permit a master, acting in good faith, in case of necessity to conduct the vessel by the safest and shortest course to her destination, or to a port for necessary repairs, and which makes the controlling consideration the safety of lives and the security of property.[7] The rule above stated is, however, substantially that of the California code.[8]

§ 2368. Determination as to which of Two Routes is Usual One—Case of Several Routes.—In determining which of two routes to the port of destination is the usual one, reference must be had to the fact whether one of the routes has acquired by mercantile usage such an ascendancy over the other as to have become the customary route. If it has, the master must follow it, unless necessity or other justifiable cause warrants sailing on the other course.[9] But if neither route has acquired such ascendancy, the case would probably come within the rule stated under the last section. If there are several routes to the same destination, with certain advantages and disadvantages to each, dependent upon winds, weather, or other circumstances, the master may choose, there being a custom allowing such election.[10]

[6] See Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 5, p. 550, noted in note in last section.

[7] Turner v. Protection Ins. Co., 25 Me. 515; 43 Am. Dec. 294; Wiggin v. Amory, 13 Mass. 118.

[8] Deering's Annot. Civ. Code Cal., sec. 2693.

[9] Brazier v. Clapp, 5 Mass. 1.

[10] 1 Marshall on Insurance, ed. 1810, 203 a, 328, citing and reporting Middlewood v. Blakes, 7 Term Rep. 162. In this case, however, the question of concealment was involved, as well also as that of whether there was a deviation or change of voyage originally intended. See 2 Duer on Marine Insurance, ed. 1846, 491, et seq. 672; 1 Phillips on Insurance, 3d ed., 319, sec. 582, p. 550. See Talcot v. Marine Ins. Co., 2 Johns. (N. Y.) 130; Reade v. Commercial Ins. Co., 3 Johns. (N. Y.) 352.

§ **2369. Deviation Defined.**—Deviation is the voluntary departure without reasonable necessity or justifying excuse, from the usual and regular course of the voyage insured, or from the usual or agreed mode of proceeding upon or conducting the same, whereby the risk is varied, irrespective of the fact whether or not it is increased thereby. It may also consist of delay in commencing or proceeding on said voyage.[11] This definition may be also extended to cover lake and river navigation.[12] It is said, however, that a deviation is an increasing or varying the risks insured against without reasonable cause.[13] So far as such a rule extends the meaning of "deviation" to include increasing the risk, it is not justified by authority, nor consistent with the principles upon which a "deviation" is based. A deviation does not avoid the policy because the risk has been increased, but because the risk or voyage insured is ended or varied by the deviation. It

[11] Coffin v. Newburyport Ins. Co., 9 Mass. 436; Seamen's Ins. Co. v. Loring, 1 Mason (C. C.), 127; Oliver v. Maryland Ins. Co., 7 Cranch (U. S.), 487; Merchants' Ins. Co. v. Algeo, 32 Pa. St. 330; Cleveland v. United Ins. Co., 8 Mason (C. C.), 308; Crousillat v. Ball, 3 Yeates (Pa.), 375; 4 Dall. (C. C.) 294; Bell v. Western etc Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542; Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J. "Any unnecessary or unexcused departure from the usual course or general mode of carrying on the voyage insured by which the risk is altered, though the original terminus ad quem of the voyage insured is still kept in view": 1 Arnould on Marine Insurance, Perkins' ed. 1850, 347; *341, et seq. See, also, 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 450, et seq.; 2 Parsons on Marine Insurance, ed. 1868, 1. "Deviation is a departure from the course of the voyage insured" which conforms to the course of sailing fixed by mercantile usage, or in case there is no usual route, then from that course which a master of ordinary skill and judgment would deem the most natural, direct, and advantageous. "Or an unreasonable delay in pursuing the voyage, or the commencement of an entirely different voyage": Deering's Annot. Civ. Code Cal., secs. 2692-94.

[12] See Jolly v. Ohio Ins. Co., Wright (Pa.), 439; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340; 12 Am. Dec. 592; Herman v. Western M. & F. Ins. Co., 13 La. 516.

[13] Bell v. Western Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542. And it was held in this case that if a marshal of the United States takes possession of a boat under a libel filed, and carries her across the river, and puts her in charge of his deputy, it does not constitute a deviation.

thereby becomes a different risk from that assumed under the contract; a different voyage is substituted, and the assurer is discharged, even though the actual risks are diminished by the deviation.[14]

§ 2370. Effect of Deviation and Basis of Underwriter's Discharge.—It is an implied warranty that the vessel shall not deviate. Any voluntary deviation is a change of risk and a departure from the contract, discharging insurers from liability for loss happening after said deviation.[15] The assured is protected by his policy while the vessel pursues the usual and customary route described by mercantile usage, but he must not depart therefrom voluntarily by even the smallest deviation, except necessity or some justifying cause warrant it If he does, the insurer is released from the time of the deviation. The courts have strictly held the insured to a compliance with this implied warranty. The purpose of the voyage must be had in view, however, and those cases where delay constitutes a deviation generally may be referred to the ship's being in port, or at some place or port to which the ship has been permitted to go in pursuit of the business of the voyage, and if the ship is at a place permitted, the delay will not be a deviation if it is necessary and must have been reasonably contemplated as proper in the prosecution of the business of the voyage. These are general principles.[16] In applying the rule that a deviation avoids the contract, there is no distinction between moral and physical necessity in justifying a departure from the usual route of the voyage in-

[14] See next section herein.

[15] Schroeder v. Schweizer Lloyd etc., 66 Cal. 294.

[16] Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endlcott, J.; Coffin v. Newburyport Ins. Co., 9 Mass. 436; Martin v. Delaware Ins. Co., 2 Wash. (C. C.) 254; Dodge v. Essex Ins. Co., 12 Gray (Mass.), 65; Kettel v. Wiggin, 13 Mass. 68; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (10 Miss.) 340; 41 Am. Dec. 592; Fernandez v. Great Western Ins. Co., 48 N. Y. 571; Williams v. Shee, 3 Camp. 469; Columbian Ins. Co. v. Cattlett, 12 Wheat. (U. S.) 383; Robertson v. Columbian Ins. Co., 8 Johns. (N. Y.) 491; Noble v. Kenneway, 2 Doug. 510-13; Middlewood v. Blakes, 7 Term Rep. 162; Merchants' Ins. Co. v. Alger, 52 Pa. St. 330; Wiggin v. Amory, 14 Mass. 1; Jolly v. Ohio Ins. Co., Wright (Ohio), 539; Brown v. Tayleur, 4 Ad. & E. 241.

sured,[17] and in determining whether a departure from the course constitutes a deviation such as vacates the policy, the motives, ends, and consequences of the act enter as a factor in arriving at a determination.[18] The underwriter is not discharged because the risk is increased. It is not material that the risk is rendered greater by the deviation; no importance is attached to the degree of the risk. The point is that the risk is different. Its nature is altered by the deviation. It is an attempt to substitute another agreement than that undertaken by the contract, and the insurer is released the moment the deviation takes place, and this rule applies without regard to the shortness of time occupied by the deviation, nor does the distance sailed off the usual course affect the contract. The only question is whether the deviation be voluntary or justifiable.[19]

[17] Riggin v. Patapsco Ins. Co., 2 Har. & J. (Md.) 279; 16 Am. Dec. 302. "Between cases of physical and moral necessity as justifications for departure from the course of the voyage, the books make no distinction, and in reason and on principle there is none," per the court.

[18] Enderby v. Fletcher, per Lord Mansfield, cited in 1 Marshall on Insurance, ed. 1810, 205, and 2 Park on Insurance, 246; Foster v. Jackson etc. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290.

[19] Maryland Ins. Co. v. Le Roy, 7 Cranch (U. S.), 26, per Johnson, J.; Coffin v. Newburyport M. Ins. Co., 9 Mass. 436; per Sedgwick, J.; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340; 41 Am. Dec. 592; Winthrop v. Union Ins. Co., 2 Wash. (C. C.) 20, per Washington, J.; Larrabee v. Wilson, Doug. 271, per Lord Mansfield; Hartley v. Buggin, 3 Doug. 39, per Lord Mansfield; Middlewood v. Blakes, 7 Term Rep. 112, per Ashurst, J., who says: "It was unnecessary to consider whether the risk was or was not materially varied. It is simply on the ground of an alteration of the risk that a deviation discharges the underwriter, so that he may be discharged even where the actual risks are diminished." "Whether the degree or period of the risk is increased is unimportant, as the assured has no right to substitute a different risk": Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J. "It is not the increase of the risk, but the substitution of another risk which governs the case": Fireman's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46-50, per Kent, Ch. "It suffices that there has been a voluntary change of route or voyage in order that the insurers should be discharged from their risks. From that moment the voyage determined by the contract is definitely broken up": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 16, pp. 578, 579.

§ **2371. Insurer Liable for Prior Loss.**—The deviation of a vessel does not have a retrospective effect so as to release the insurer from a loss occurring prior thereto. The contract, so far as the deviation is concerned, remains binding upon the assurer up to the moment of deviation.[20]

§ **2372. Temporary Deviation and Return to Course Prior to Loss.**—Where a vessel voluntarily deviates without necessity or justifying excuse, the assurer is none the less released because the vessel subsequently returns to the usual course before a loss occurs, for the risk is not suspended by the temporary deviation; neither the length of time of the deviation nor the distance the vessel goes from the course makes it the less a deviation discharging the underwriter. So Emerigon says the risk is not merely suspended; "the places of the risk once abandoned through a voluntary deviation do not again present themselves to the eyes of the law. A contract once dissolved can be renewed only by the respective consent of the parties. Pothier establishes it as a principle that 'the insurers are not bound for the risks when there is a departure from what is borne by the policy, if it be not with their consent or in case of necessity.' "[21] So a willful deviation from the usual and customary course of the voyage determines the insurance from the moment of deviation, and it is immaterial from what cause or from what place a subsequent loss happens.[22] This rule, however, does not preclude such

[20] Richardson v. Maine Ins. Co., 6 Mass. 121. "When the master discontinued his voyage, by which is understood an abandonment of it, with an intention in him no further to pursue it, and sailed for his original port, from that time the policy was discharged. For all sea damages happening before, the plaintiffs can recover," per the court. See, also, Coffin v. Newburyport Ins. Co., 9 Mass. 447; Hare v. Travis, 7 Barn. & C. 15; Lee v. Gray, 7 Mass. 352; Green v. Young, 2 Salk. 444; 2 Ld. Raym. 840.

[21] Emerigon on Insurance, Meredith's ed. 1850, c. 13, sec. 16, pp. 578, 579; Townsend v. Guion, and Fox v. Black, Beawes, 315, both noted in 1 Marshall on Insurance, ed. 1810, 186; Clason v. Simmonds, cited by Lawrence, J., 6 Term Rep. 533; Burgess v. Equitable M. Ins. Co., 126 Mass. 70; Martin v. Delaware Ins. Co., 2 Wash. (C. C.) 254; Coffin v. Newburyport Ins. Co., 9 Mass. 449.

[22] Elliot v. Wilson, 7 Brown Parl. C. 459.

reasonable delay in port or ports as may be necessary or justifiable in the proper prosecuting of the business of the voyage, so far as the same may reasonably be presumed to have been contemplated by the parties.[23]

§ 2373. **Same Subject—Certain Class of Cases Distinguishable.**—There is, however, a certain class of cases sometimes cited as supporting the doctrine that there may be a temporary deviation, but they differ in principle, and can be readily distinguished from those above noted, and do not impair the force of the rule above given, being time policies or

[23] Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J., and cases cited. See, also, Casher v. Cunningham, 1 Bligh P. C. 100, per Lord Elden. Mr. Phillips is of the opinion that if a deviation be temporary without subsequently affecting the risk, the risk is merely suspended, and that the law does not regard such inconsiderable circumstance as the delay of an hour or a deviation of a mile, but is satisfied by reasonable diligence and dispatch: 1 Phillips on Insurance, 3d ed., 548, sec. 989. Concerning this statement the answer is that the question of deviation does not depend upon whether the risk is increased or not, but whether the risk has been varied and another substituted, and if it did not depend upon such fact, it is difficult to conceive a case where after a temporary deviation everything can be restored to the same order as before, although it might be within the range of possibilities. If the condition has any force, the contract is dissolved by the breach. A different risk has been voluntarily substituted by the assured without the assurer's consent, and without necessity or justifying excuse. Mr. Phillips' statement is also misleading, for it may be admitted without changing the rule that where the question is purely one of delay in port or ports, the law inquires whether the delay is reasonable, and whether it is justified by the nature and purposes of the voyage or the circumstances of the case. A reasonable delay or departure from the course, if warranted by necessity or otherwise legally justified, is not a deviation, but a voluntary departure or delay not justified is declared by a court of high authority in a comparatively recent case to be a deviation avoiding the policy, whether the degree or period of the risk is increased or not, and the discussion of the question of deviation and its effect by the court in this case is of itself impliedly a complete answer in itself of Mr. Phillips' position: Burgess v. Equitable M. Ins. Co., 126 Mass. 70, Endicott, J. We would also add that if in practice a temporary deviation may be allowed by the assurer, yet such practice does not establish the rule of law claimed, unless perhaps the practice is of such a character, and so long continued, as to import under the circumstances the condition that a certain discretion was vested in the master in the particular case.

dependent upon special clauses, for "deviation" rests upon the description of the voyage insured, and relates to a departure from the usual course thereof, or mode of conducting the same, or to a delay in commencing or prosecuting said voyage. As an illustration of the class of cases referred to, it is held that an insurance on a tugboat in port and while engaged in towing is not avoided by the going outside of the prescribed limits of the contract, where the boat returns within said limits before loss;[24] and where the contract of insurance on a steamboat stipulates for its continuance for one year, "unless it is terminated or made void by conditions hereinafter expressed," and contains a "permission to navigate the Ohio and Mississippi rivers below Cairo," but contains no condition expressly avoiding the policy for navigating the boat outside of the permitted waters, and the boat makes a trip outside of these permitted waters and returns in safety, but she is afterward destroyed by fire in no way caused or contributed to by such departure, it is held that the only effect of such deviation was to relieve the insurer from any loss happening outside of the permitted waters, and that said policy was not avoided thereby, and that after temporary departure and return in safety to the permitted waters the insurers were liable for a subsequent loss covered by the policy not caused or contributed to by such deviation.[25] A time policy of insurance on a ship with permission to navigate all the tributaries of a river except a few named is not avoided by the ships navigating an excepted tributary, so that the insurance company would not be liable for a loss occurring after such tributary had been left, as the exception does not amount to a prohibition or a warranty.[26]

§ **2374. Time Policy—Navigation Limited.**—As we have seen, the termini under a purely time policy are fixed by time. The policy limits the vessel to no geographical or prescribed

[24] Hennesey v. Manhattan F. Ins. Co., 28 Hun (N. Y.), 98.

[25] Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317; 27 Am. Rep. 455, overruling 2 Cinc. (Ohio) 204.

[26] Greenleaf v. St. Louis Ins. Co., 37 Mo. 25. And see, also, Odiborne v. New England etc. Ins. Co., 101 Mass. 55; 3 Am. Rep. 401,

track. It insures no specific voyage within the prescribed term.[27] The nature of the contract, therefore, precludes a deviation, as that term is generally understood. If it covers all voyages within certain limits, there can be no deviation, nor can any particular trip or voyage have the effect of a deviation, unless it be in fraud of the policy,[28] although in case the time is specified the vessel may be limited by the terms of the contract to the navigation of certain waters, or to a trading between certain designated ports or places, and such designation may operate as a limitation of the voyages of the ship within those waters, and not permit of a passage or trading outside the same.[29] A liberty "to navigate the Atlantic Ocean between Europe and America" includes the right to navigate the Gulf of Mexico, it being a part of the Atlantic Ocean.[30] A liberty given a steamboat insured under a time policy to navigate the Mississippi and such tributaries as are suitable to her class does not permit the towing of vessels, for such business is separate from and not incidental to river navigation by steamboats, and therefore changes the risk assumed by assurers.[31] And if a steamer is insured on time to be used between certain ports by way of a designated bay and its tributaries, it is thereby confined to voyages between the specified places over the designated route.[32] So under a time policy certain waters may be prohibited, and entering such waters is a breach of the condition, although the insurers are liable in such case for loss occasioned prior thereto.[33] So where a policy on plaintiff's vessel contained the following clause,

noted in next section; Hathaway v. Sun Ins. Co., 8 Bosw. (N. Y.) 33; Anon. v. Westmore, 6 Esp. 109; Snow v. Columbian Ins. Co., 48 N. Y. 624; 48 Barb. (N. Y.) 469. See, also, sec. 2402, herein.

[27] Bradley v. Maryland Ins. Co., 12 Pet. (U. S.) 378.

[28] Keeler v. Fireman's Ins. Co., 3 Hill (N. Y.), 250, per Cowen, J.; Union Ins. Co. v. Tysen, 3 Hill (N. Y.), 118. See Stuart v. Columbian Ins. Co., 2 Cranch (C. C.), 442.

[29] Lippincourt v. Louisiana Ins. Co., 2 La. (O. S.) 400.

[30] The Orient, 16 Fed. Rep. 916.

[31] Herman v. Western M. & F. Ins. Co., 13 La. (O. S.) 516.

[32] Dallam v. Insurance Co., 6 Phila. (Pa.) 15. See Commonwealth Ins. Co. v. Cropper, 21 Md. 311.

[33] Bearns v. Columbian Ins. Co., 48 Barb. (N. Y.) 445.

"Prohibited from the river and gulf of St. Lawrence, Northumberland Straits, or Cape Breton, and the Black Sea," between specified dates, and the vessel was in one of the prohibited ports soon after the insurance was effected, and was lost at sea many months afterward, it was held that the implied warranty had been broken, and plaintiff could not recover.[34] But where a vessel is insured from Boston to all ports and places on the globe and until her return to Boston, for a period not exceeding two years, no deviation arises from the fact that the vessel arrives in Boston Bay within two years and puts into Salem, and is damaged while there undergoing repairs.[35]

§ **2375. Intention to Deviate—Change of Voyage.**—There is, as we have noted, a distinction between deviation and a change of voyage.[36] If a mere intention to deviate is abandoned, and the master holds to the usual course of the voyage insured, the underwriters are not discharged. A mere intention to deviate, or even instructions to deviate where the intention is not carried into effect, does not release the insurer. The policy nevertheless continues in force until the deviation be once begun; that is, until the ship reaches the dividing point.[37] If the voyage is commenced under a fluctuating purpose to deviate if certain facts shall be found to exist, the insurers are liable for a loss before actual deviation; as where the master's orders were to go to a certain port for information and she was captured before the dividing line was reached.[38] So the master's intention to put into an inter-

[34] Odbiorne v. New England Mut. Ins. Co., 101 Mass. 551; 3 Am. Rep. 401.

[35] Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14.

[36] Section 1488, herein.

[37] Foster v. Willmer, 2 Str. 1249; Hare v. Travis, 7 Barn. & C. 14; 5 L. J. K. B. 348; Maryland Ins. Co. v. Wood, 6 Cranch (U. S.), 29; Heselton v. Allnot, 1 Maule & S. 46; Lee v. Gray, 7 Mass. 349; Arnold v. Pacific Mut. Ins. Co., 78 N. Y. 7; Kewley v. Ryan, 2 H. Black. 343; M'Fee v. South Carolina Ins. Co., 2 McCord (S. C.), 503; Marine Ins. Co. v. Tucker, 3 Cranch (U. S.), 357; Henshaw v. Marine Ins. Co., 2 Caines (N. Y.), 274; Thellusson v. Fergusson, 1 Doug. 361; Emerigon on Insurance, Meredith's ed. 1850, c. 13, sec. 14, p. 574, et seq.

[38] Heselton v. Allnot, 1 Maule & S. 46.

mediate port, the terminus ad quem being kept in view, is merely an intention to deviate, and is not a change of voyage.[39] And if the master intends to deviate by going to a certain port, but is forced to put into such port by necessity, this is not a deviation.[40] If the vessel sails to another destination than that specified as the terminus ad quem of the voyage insured, or if in the execution of an original intention the captain or master ceases to pursue the usual course, and abandons or loses sight of such original destination, or if it appears by the vessel's papers that a different voyage was had in view from the beginning, and the ship is lost before the dividing point is reached, these are cases of a change of voyage, and not merely of intended deviation, and the insurance is void from the time the purpose is definitely formed to change the voyage. The general test is, whether the original destination is still kept in view or lost sight of; if the latter, the identity of the voyage is gone.[41] If a vessel sails to a port within the policy with intent to go to a port not within the policy in case the former should be blockaded, this is not a deviation.[42] It is apparent, therefore, that if the ship in a voyage "from" sails on an entirely different voyage from that insured, the risk never attaches, whatever may be the intention, and assured in such case would not be aided by the fact that the intention to abandon, so manifested, is changed, and the ship sails thereafter into the usual route of the voyage insured, and then proceeds to the destination designated in the policy. But where the intention at the time of sailing is to deviate at some future time from the usual route, and the

[39] Hobart v. Norton, 8 Pick. (Mass.) 159. See Henshaw v. Marine Ins. Co., 2 Caines (N. Y.), 274; Silva v. Low, 1 Johns. (N. Y.) 184.

[40] Hobart v. Norton, 8 Pick. (Mass.) 159.

[41] Emerigon on Insurance, Meredith's ed. 1850, c. 13, sec. 14, p. 574, et seq. New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46; Woolridge v. Boydell, Doug. 16 a, per Lord Mansfield; Merchants' Ins. Co. v. Algeo, 32 Pa. St. 230; Henshaw v. Marine Ins. Co., 2 Caines (N. Y.), 274; Silva v. Low, 1 Johns. (N. Y.) 184, criticised in 1 Phillips on Insurance, 3d ed., 558, sec. 1001.

[42] Maryland Ins. Co. v. Woods, 6 Cranch (U. S.), 29; M'Fee v. Insurance Co., 2 McCord (S. C.), 503; Coffin v. Newburyport Ins. Co., 9 Mass. 436; Winter v. Delaware Ins. Co., 30 Pa. St. 334.

ship sails on the voyage insured and pursues the customary course, keeping in view the terminus ad quem specified, the insurance, having attached, remains in force until there is a departure from said course, or, in the usual words, until the dividing point is reached. Again, a policy may be "at and from," but a delay in port in preparation for a different voyage and the taking of a cargo for a different destination substitutes another risk which the assurers did not assume, and they are therefore discharged.[43] In determining, however, whether at the time of loss there is an intent definitely formed whereby the terminus ad quem is definitely lost sight of or abandoned, the circumstances are to be taken as evidence, and undoubtedly there must be clearer evidence than a mere meditated change of voyage. While the intention is manifested by the acts of the insured or his authorized agent before the voyage is commenced, the determination of the point is comparatively clear of ascertainment.[44]

[43] The above illustrations, as well as others, are supported by the following authorities: Stocker v. Harris, 3 Mass. 409; Forbes v. Church, 3 Johns. Cas. (N. Y.) 159; Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408; Merrill v. Boylston F. & M. Ins. Co., 3 Allen (Mass.), 247; Sellar v. McVickar, 4 Bos. & P. 23; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241; Henshaw v. Marine Ins. Co., 2 Caines (N. Y.), 274; Bottomley v. Borell, 5 Barn. & C. 210; Marine Ins. Co. v. Tucker, 3 Cranch (U. S.), 357; Hall v. Brown, 2 Dow Parl. C. 367; Way v. Modigliani, 2 Term Rep. 30; Winter v. Delaware Mut. Ins. Co., 30 Pa. St. 334; Foster v. Wilmer, 2 Strange, 1249; New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46; Tasker v. Cunningham, 1 Bligh P. C. 87, per Lord Eldon. See, also, authorities under this section, and sec. 1488, herein. But Emerigon says Roccus is of opinion that "the voyage is changed so soon as the captain freights his vessel for another place; vel convenerit aspotare alias merces in alium locum. I am not of this opinion, and I consider that if before the departure of the vessel the captain, abandoning his new project, holds to the voyage determined by the policy, all returns into order, and the insurance remains in force": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 14, p. 575. And see Henkle v. Royal Exch. Assur. Co., 1 Ves. 317; Kewley v. Ryan, 2 H. Black. 343; Planchette v. Fletcher, 1 Doug. 251; Taylor v. Lowell, 3 Mass. 331; Merchants' Ins. Co. v. Clapp, 10 Pick. (Mass.) 56.

[44] See Tasker v. Cunningham, 1 Bligh P. C. 100, per Lord Eldon; Marine Ins. Co. v. Tucker, 3 Cranch (U. S.), 357; Marsden v. Reid, 3 East, 572; Wooldridge v. Boydell, 1 Doug. 16; Hall v. Brown, 2

§ 2376. Abandonment of Voyage—Peril not Insured against.—It may be stated as a general rule that the insured is not justified in an abandonment of the voyage to avoid a peril not insured against, and in substituting therefor an entirely different one.[45]

§ 2377. Effect of Intention Fixed at or after Sailing to Change Destination.—In case the ship sails on her voyage and the intention to go to another terminus ad quem is then formed, but the ship is lost before the dividing point is reached, the United States supreme court has held that this is substantially an intention to deviate, and not a change of voyage. In brief, that the assurer is liable until the intention is consummated by some act changing the risk.[46] In a New York case, however, a vessel was insured from New York to Gothenburg, and thence to a port of discharge in the Baltic Sea. The vessel sailed from Gothenburg with the intention of proceeding to St. Petersburg, which had been elected as the port of discharge. She was, however, forced into Carlsand, whence the assured's agent directed her to proceed to Stockholm, which port was reached by a route common to that to St. Peterburg for a part of the way. Before the vessel arrived at the point of divergence she was captured, and it was held that there was an abandonment, and not an intention to deviate.[47] So in a Massachusetts case the insurance was under a time policy on a fishing vessel, wherein she was prohibited from sailing on a voyage from beyond E. after a certain date. She sailed to E. after the date for the purpose of pro-

Dow Parl. C. 367; Silva v. Low, 1 Johns. (N. Y.) 184, criticised as being only a case of intended deviation in 1 Phillips on Insurance, 3d ed., 558, sec. 1001.

[45] Lee v. Gray, 7 Mass. 349. See King v. Delaware Ins. Co., 6 Cranch (U. S.), 712; 2 W. C. C. 300; Richardson v. Maine M. & F. Ins. Co., 6 Mass. 102.

[46] Marine Ins. Co. v. Tucker, 3 Cranch (U. S.), 357. See, also, Winter v. Delaware Mut. S. Ins. Co., 30 Pa. St. 334.

[47] Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46. Examine 3 Kent's Commentaries, 5th ed., 317; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241; Smith v. Steinbach, 2 Caines Cas. (N.Y.) 172; Winthrop v. Union Ins. Co., 2 Wash. (C. C.) 7; Silva v. Low, 1 Johns. (N. Y.) 184; Henshaw v. Marine Ins. Co., 2 Caines Cas. (N. Y.) 274.

curing "bait" for a fishing trip, and was lost before reaching E., and the court rested the decision upon the point whether the vessel left G. with the intent to proceed beyond E., or merely to go to E., and holding that the assured must show that the ship was not on a prohibited voyage. The court also determined that in this case the word "voyage" meant enterprise.[48] The United States supreme court case first above noted is also opposed to the English rule as stated by Mr. Arnould and Mr. Maclachlan, according to whom, if the assured either before the ship sails had a determination to abandon the original port of destination and fix upon another, the underwriter is thereby discharged in case of loss happening after such purpose becomes fixed, even though the loss occurs while the vessel is on the common route of both voyages, or even under a policy "at" and "from" before she sails from the port of commencement of the risk.[49] The main difficulty in formulating a positive rule arises from the fact that the route to the original and changed destination is over the same course for that part of the voyage on which the vessel is sailing when lost, and before the intention to abandon is consummated by some act. If the question be held to be one of intention merely, there would be some force in the argument that there was room for repentance before the dividing line was reached, whether the intention be to abandon or to deviate, except perhaps where the master is sailing under instructions.[50] If, however, it is clear that from all the circumstances the intention has been definitely fixed to change the destination, the vessel might reasonably be held to be sailing on the voyage to the changed destination, even though the route is over the same course a part of the way. It would seem, therefore, as heretofore

[48] Friend v. Gloucester, 113 Mass. 326. See, also, Merrill v. Boylston F. & M. Ins. Co., 3 Allen (Mass), 247.

[49] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 357, *351, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 457-59, citing Tasker v. Cunningham, 1 Bligh Parl. C. 87-100, per Lord Eldon.

[50] See as to instructions to master, Middlewood v. Blakes, 7 Term Rep. 112, per Lord Kenyon; New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46, per Kent, Ch.

stated[50a] that it would be a question of evidence whether the terminus ad quem of the original voyage has been so far lost sight of as to constitute a change of voyage.[51]

§ **2378. Voyage Shortened.**—If the assured has commenced the voyage insured, but voluntarily and without necessity or justifying excuse returns to the place of sailing, the insurers would probably be discharged.[52] Mr. Arnould, relying upon Emerigon, says that a mere shortening of the voyage does not avoid the policy where the voyage is not abandoned at the outset by a change of destination, and he adds that where the ship is insured to successive ports, she may terminate the voyage at a nearer port without vitiating the policy, but if the voyage is to a single port, she sails with an intent to go to a nearer, which is done, the contract is avoided.[53]

§ **2379. Voyage "at and from" Port or Ports.**—If a voyage is to commence "at and from" a specified port, with liberty to touch at other ports, such liberty does not permit the assured to begin the adventure at any one of said ports. The voyage must commence at the terminus a quo designated, or at some place that is properly a part thereof, otherwise it will not be the voyage insured. This rule is subject to such ex-

[50a] Sec. 2375, herein.

[51] See 2 Parsons on Marine Insurance, ed. 1868, 41, who says: "In general, that if the proposed change in the voyage was sufficient in extent, quantity, and importance to make it a change of the whole voyage, then here was an abandonment of the voyage intended, and the substitution of another." Otherwise it is only an intended deviation, and this writer is also inclined to the opinion that sailing with an intention to go to another than the original terminus of the insured voyage, even though the vessel sails over a larger part of the same course, is an abandonment, or change of voyage.

[52] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 12, p. 571.

[53] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 359, *353; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 460. The rule differs somewhat in Mr. Maclachlan's edition from that given in Mr. Perkins' edition, citing Emerigon on Insurance, c. xiii, sec. 12. See Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 12, p. 570. See Hadkinson v. Robinson, 3 Bos. & P. 388; Lubbock v. Rowcroft, 5 Esp. 50; Middlewood v. Blakes, 7 Term Rep. 162.

ceptions as may arise from usage, or which may exist in case of an island or district with several ports.[54] But if an insurance is on goods "at and from" a designated port, and all or any of the ports in said district, even though said port be out of the usual or direct course between the port named and the port of final destination, going to said port of loading is not a deviation.[55]

§ **2380. Preliminary Voyage—Completing Loading at Different Ports.**—A deviation may arise from a preliminary voyage, as in case where a risk is an indivisible one "at and from" a port where the vessel is lying to another, and there is a departure from the port on a voyage other than that insured. This is illustrated by the following case: A policy of insurance was issued on a vessel undergoing repairs in New York, "at and from" New York to Havana. On the completion of the repairs the vessel went on a trial trip to Elizabethport, sixteen miles distant, to take in coal. She returned to New York and sailed thence to Havana. It was held a deviation so as to avoid the policy.[56] If the risk is to commence from the ship's port of loading under a policy "at and from," it is a deviation for the vessel to go to a different port and there complete her loading commenced at the port designated, unless such second place of loading be within the limits of a port or the first port; as in the case of moving from one pier or wharf at the same port or place, but sailing to a place seven miles distant, although in the same bay, is a deviation, though the vessel returns to the port of loading and sails therefrom.[57]

§ **2381. Alternative Ports of Destination.**—If a voyage is described as "at and from" a specified port to ports in

[54] Murray v. Col. Ins. Co., 4 Johns. (N. Y.) 443; Maryland Ins. Co. v. Bossiere, 9 Gill & J. (Md.) 121; Park v. Hammond, 6 Taunt. 495; 4 Camp. 344; 1 Holt, 80. See chaps. xxxvii, xxxviii, herein.

[55] Bragg v. Anderson, 4 Taunt. 229; Lambert v. Leiddard, 5 Taunt. 480. See chaps. xxvii, xxxviii, herein.

[56] Fernandez v. Great Western Ins. Co., 48 N. Y. 571; 8 Am. Rep. 571.

[57] Brown v. Tayleur, 4 Ad. & E. 241; 5 Nev. & M. 472.

the alternative, as A or B, it constitutes a deviation for the vessel to go to both ports, except it be warranted by usage so certain, uniform, and notorious as to raise the presumption that the contract was made in view thereof.[58]

§ 2382. The Word "Thence" from Port or Ports of Discharge in Two Specified Localities will Cover Either Locality.—If a vessel be insured "at and from" to all or any ports or places in two specified localities, "thence home," the word "thence" will refer to ports or places in either locality, and permit her after she has left the port in one of the specified localities to return a second time to a port in the other specified locality, in order to complete her lading for the home voyage, for the word "thence" is of general application.[59]

§ 2383. Election of Ports—Specified or Geographical Order of Visiting Ports of Discharge.—If several ports or places are specifically named in the policy, and the assured intends to visit but one of them, that one is at his election. If, however, he purposes to stop at more than one, the ship must go to those intended to be visited in the order specified in the policy, with reference to the route to the ulterior port of destination selected, unless, perhaps, there is a usage to the contrary. This rule does not preclude dropping some of the places specified. If there is no order designated by the policy, then the ports of discharge must be visited in their geographical order as governed by their relative distance from the port of departure, reference also being had to the route to the ulterior port of destination selected, unless the geographical order be controlled and varied by usage, in which case the order established by usage may be followed.[60] Thus,

[58] Bulkley v. Protection Ins. Co., 2 Paine (C. C.), 82; Dodge v. Essex Ins. Co., 12 Gray (Mass.), 65.

[59] Ashley v. Pratt, 16 Mees. & W. 471; affirmed, 1 Exch. 257; 17 L. J. Ex. 135. See Perkins v. Augusta etc. Ins. Co., 10 Gray (Mass.), 312; 71 Am. Dec. 654. Contra, Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408. The rule in the text seems the better one, however.

[60] Kane v. Columbian Ins. Co., 2 Johns. (N. Y.) 264; Hunter v. Leathley, 10 Barn. & C. 873, per Tindall, C. J.; Beakson v. Haworth,

in case of an insurance from N. to A., thence to C., the vessel may go directly to C., and is not obligated to stop at A.[61] Cases of the character indicated by this rule are to be distinguished from those where it is evident that the specification of port is descriptive of the limits of the voyage, rather than of the order in which the ports are to be visited.[62] And if the policy be "at and from," with liberty to touch at all or any of a group of islands, the vessel is not obligated to visit them in their geographical order, but may go from island to island for purposes connected with the voyage;[63] unless some one of said islands be elected as the port of discharge.[64] It is not a deviation, however, if the ship be compelled by necessity or other justifying cause to alter the order of visiting ports or places.[65]

§ 2384. Ports of Discharge—Revisiting or Returning to Port.[66]—In the absence of an express or implied liberty so to do in the policy, or implied by construction from the character of the voyage or nature of the risk as described in the policy, a ship insured to ports of discharge, and having elected her port of discharge, may not sail backward and forward, nor revisit a port at which she has touched in the direct course of the voyage, or return to one she has passed in proceeding to a port elected as the port of discharge.[67] A

6 Term Rep. 531, and opinion of Lord Ellenborough therein; Marsden v. Reed, 3 East, 517; Hale v. Merc. M. Ins. Co., 6 Pick. (Mass.) 172; Clason v. Simmonds, 6 Term Rep. 533, n.; Gardner v. Seabourne, 3 Taunt. 16. But see Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408.

[61] Kane v. Columbian Ins. Co., 2 Johns. (N. Y.) 265. See Stone v. Marine Ins. Co., 1 Exch. Div. 81; Hale v. Mer. Ins. Co., 6 Pick. (Mass.) 172.

[62] See Ashley v. Pratt, 16 Mees. & W. 471; affirmed, 1 Exch. 357; 17 L. J. Ex. 135, per Denman, J. Examine Commonwealth Ins. Co. v. Cropper, 21 Md. 311.

[63] Metcalf v. Parry, 4 Camp. 123.

[64] Gardner v. Senhouse, 3 Taunt. 16.

[65] 1 Marshall on Insurance, ed. 1810, *191; Driscoll v. Bovil, 1 Bos. & P. 313.

[66] See secs. 2387, 2388, herein.

[67] Gardner v. Senhouse, 3 Taunt. 16; Clason v. Simmonds, 6 Term Rep. 533, n.; Andrews v. Mellish, 5 Taunt. 496, per Gibbs, C. J., explaining the last case cited; 16 East, 312; 2 Maule & S. 27; 15 East, 4. See, also, Burgess v. Equitable M. Ins. Co., 126 Mass. 70.

return to a port on a voyage, owing to stress of weather, the ultimate destination not being abandoned and the route not being departed from, is not a change of risk releasing the insurers.[68]

§ 2385. Returning to Terminus a quo for Clearance. If a vessel is insured "at and from" a designated port to an island, thence to a specified port in an island, she may be warranted by usage in returning to the terminus a quo for clearance, where none can be obtained at the island or place of loading, and such act is not a deviation. This was so held in a case of insurance at and from Callao to the Chincha Islands, thence to New York.[69] But where a vessel was insured "at and from" Port Plata to New York, it was held a deviation to go to Susa, from whence the ship would have been obligated to return to Port Plata for clearance, although Susa was a bay or open road distant four leagues east of La Plata, but a part of the district of Port Plata.[70] And it is a deviation for the vessel to go out of her course to obtain sailing papers.[71]

§ 2386. "Near Open Port" refers to Geographical Order. The term "near open port" must be construed with reference to the geographical order of the ports, exclusive of such ports as are closed or which may not be safely entered. But the facility of reaching a more distant port than the one geographically near, by reason of favorable winds or currents, does not of itself make such distant port a "near open port." The construction of this term has arisen under policies giving liberty to proceed to such a port if turned away from the specified destination, and an attempt to make a more distant port when one is nearer, in the sense above stated, constitutes a deviation.[72]

[68] Winter v. Delaware M. Ins. Co., 30 Pa. St. 334.

[69] Parsons v. Manufacturers' Ins. Co., 16 Gray (82 Mass.), 463; Moxon v. Atkins, 3 Camp. 200.

[70] Vos v. Robinson, 9 Johns. (N. Y.) 192.

[71] Stocker v. Harris, 3 Mass. 409.

[72] Tenet v. Phœnix Ins. Co., 7 Johns. (N. Y.) 363; 8 Johns. (N. Y.) 277; Ferguson v. Phœnix Ins. Co., 5 Binn. (Pa.) 594. See Snowden v. Phœnix Ins. Co., 3 Binn. (Pa.) 457.

§ **2387. To an Island and a Market.**—If the vessel is insured to an island in the West Indies and a market, she may sail bona fide from island to island or place to place, backward and forward, in search of a market, and is not compelled to visit them in their geographical order, nor is it a deviation in such case though the vessel revisits or returns to a place.[73] The master of a vessel insured "to Kingston and market in Jamaica" was ordered when off the east end of the island, if in season to fulfill a contract to deliver goods at Port Maria, to proceed thither, otherwise to put into Kingston. She went to Port Maria and not to Kingston and was lost on her return voyage, and it was held that there was an inception of the voyage insured, and no deviation.[74] A vessel insured to a certain port and a market need not stop at said port.[75]

§ **2388. To a Port in an Island or District, Thence to a Port of Advice or Discharge.**—If a vessel is insured to a port in an island or district, thence to a port of advice or discharge, she may not, after visiting a port in said island or district and discharging her cargo, depart to another port therein, obtain a cargo, and proceed thence to a port of discharge within the limits originally specified; such act constitutes a deviation.[76]

§ **2389. Vessel Captured and Carried out of Her Course—False Papers.**—It is said that a deviation may arise from the vessel's being captured and carried out of her course by reason of carrying false papers.[77]

§ **2390. Deviation to Supply or Repair Defect in Fitting for Original Voyage.**—It is assumed that the vessel must be seaworthy for her voyage, and if a vessel is not prop-

[73] Houston v. New England Ins. Co., 5 Pick (Mass.) 89; De Blois v. Ocean Ins. Co., 16 Pick. (Mass.) 303; Maxwell v. Robinson, 1 Johns. (N. Y.) 333. See sec. 2384, herein.

[74] Houston v. New England Ins. Co., 5 Pick. (Mass.) 89.

[75] Houston v. New England Ins. Co., 5 Pick. (Mass.) 89.

[76] Hearne v. Marine Ins. Co., 20 Wall. (U. S.) 488.

[77] Goix v. Low, 1 Johns. (N. Y.) 346, per Kent, J. Examine Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506, per Marshall, C. J.; Galbraith v. Gray, 1 Wash. (C. C.) 192.

erly fitted for her voyage and sails in such a condition under a policy "from," a deviation to supply such defects is not justifiable, as the ship should have been properly fitted for the voyage at the time of sailing.[78] So where a policy was issued on a codfishing vessel for the voyage from Plymouth to the Banks and back, and, after arriving at the Banks, the vessel got out of bait and put into St. Peters, the nearest practicable port, for a supply, it was held, in the absence of proof of usage, a fatal deviation.[79] Again, a steamboat was insured for a voyage between two ports, with liberty to "touch and stay at any ports and places if thereunto obliged by stress of weather or other unavoidable accident." On her voyage she stopped at an intermediate port to repair a defect in her chimney, which existed and which was known to her owners before she left the port of departure. While thus waiting for repairs she was destroyed by a peril insured against, and it was held that the stoppage was such a deviation as to avoid the policy.[80] But where a vessel was insured from Stockholm to New York, having on board a cargo of sheep for which she had not taken sufficient provender for the voyage, it being understood that she was to touch at Elsinore, where she stopped for convoy and to pay sound dues, and while there, and without delaying the voyage, she obtained sufficient provender, it was held no deviation.[81] There is a question, however, whether a slight defect in the vessel's seaworthiness may not be remedied before loss; so also in cases of a policy "at and from." These points have, however, been discussed fully elsewhere.[82] But it is held no deviation to put into port to unload where the vessel is overloaded,[83] or, having insufficient

[78] Cruder v. Philadelphia Ins. Co., 2 Wash. (C. C.) 339, 262; Copeland v. New England M. Ins. Co., 2 Met. (Mass.) 444; Wolff v. Claggett, 3 Esp. 257; Kepple v. Wiggin, 13 Mass. 68; Foreshaw v. Chabert, 3 Brod. & B. 158; 6 J. B. Moore, 369.

[79] Burgess v. Equitable M. Ins. Co., 126 Mass. 70; 30 Am. Rep. 64.

[80] Audenreid v. Mercantile Mut. Ins. Co., 60 N. Y. 482; 19 Am. Rep. 204.

[81] Cormack v. Gladstone, 11 East, 347.

[82] See secs. 2166, 2181-83, herein.

[83] Weir v. Aberdeen, 2 Barn. & Ald. 320; Chase v. Eagle Ins. Co., 5 Pick. (Mass.) 51.

ballast, to put into the nearest port to remedy the defect.[84] Such a rule as that first above stated would not, however, be applicable to a case where a port is called at to obtain a pilot according to usage;[85] nor to a case where the vessel runs short of water, and being fairly in need thereof puts into a port to obtain a necessary supply, the vessel having originally been fitted out with a sufficient quantity of water, such as an ordinary voyage of the character of that insured would require;[86] nor where the vessel puts ashore for provisions, being compelled to delay the voyage by head winds; [87] nor would the rule apply to a case where the vessel, having sailed with a sufficient crew for the voyage, but needing two more men for the purposes of fishing, proceeded to another port to complete the fishing crew in accordance with a usage justifying such act, although it was also held that stopping for more men would be a deviation except for the usage;[88] nor to a case where all the superior officers of a ship on a long voyage have died;[89] nor to a departure from the route to procure men to supply a deficiency as to the numbers of a crew originally sufficient, brought about by sickness, disability, or death.[90]

§ 2391. Reshipment of Goods on the Voyage not of itself a Deviation under Liberty to Reship.—The reshipment of goods on the voyage to be carried in another vessel to the port of destination is not of itself a deviation avoiding the policy, where liberty is given by the contract to reship at all times and places. It might be a question, however, whether the point of delay or abandonment of the voyage would not be a defense.[91]

[84] Gilbert v. Redshaw, reported in 1 Marshall on Insurance, ed. 1810, 208. The above were the facts, although the grounds on which this decision rested was a necessity for repairs.

[85] Pouverin v. Lousiana State Ins. Co., 4 Rob. (La.) 234.

[86] Wood v. Plessants, 3 Wash. (C. C.) 201.

[87] Thomas v. Royal Exch. Co., 1 Price, 195.

[88] Folsom v. Merchants' Ins. Co., 38 Me. 414; Cruder v. Phils. Ins. Co., 2 Wash. (C. C.) 339. See sec. 2166, herein.

[89] Winthrop v. Union Ins. Co., 2 Wash. (C. C.) 1.

[90] Wolff v. Claggett, 3 Esp. 257, per Lord Eldon.

[91] Fletcher v. St. Louis M. Ins. Co., 18 Mo. 193.

§ 2392. Transshipment.—If a cargo is insured in a voyage direct from one port to another, a transshipment before reaching the port of destination is a deviation, and releases the insurers if they have not contracted with reference thereto, and it is immaterial whether such transshipment is authorized by the bill of lading or not. This rule would, however, be subject to such exceptions as arise in cases of transshipment occasioned by necessity;[92] but the vessel, when compelled to return to her port of lading for repairs, is held justified in unloading her cargo and then shipping it by land to another port, not on the direct course for passage, and going there subsequently to take it.[93]

§ 2393. Liberty of Port and Places—Purposes of Voyage.—The clauses under which a liberty to stop at or use ports and places is given are various, but the scope of the permission depends not so much upon the construction of the clauses themselves as upon the purposes of the voyage, and, as a general rule, the permission in a policy to go to, or to touch at, or to call at, or to touch and stay at, certain ports and places must be construed with reference to the real objects and purposes of the voyage contemplated, and accordingly these clauses will not be literally construed and confined to the exact meaning of the terms used, irrespective of what must have been clearly intended as within the scope and purpose of that particular voyage covered by that policy.[94]

[92] Schroeder v. Schweitzer Lloyd etc. Gesellschaft, 66 Cal. 294; 60 Cal. 467; 44 Am. Rep. 61; Settle v. St. Louis Perp. Ins. Co., 7 Mo. 379; Bold v. Rotheran, 8 Ad. & E., N. S., 797; 8 Q. B. 797; 15 L. J. Q. B. 274; Salisbury v. St. Louis Ins. Co., 23 Mo. 553. See secs. 1594-96, 1769, herein.

[93] Wiggin v. Amory, 13 Mass. 118.

[94] Urquhart v. Bernard, 1 Taunt. 450; Seccomb v. Provincial Ins. Co., 10 Allen (Mass.), 305; Bottomley v. Bovil, 5 Barn. & C. 210; 7 Dowl. & R. 702; Child v. Sun Mut. Ins. Co., 3 Sand. (N. Y.) 26; Phillips v. Irving, 7 Man. & G. 325; Metcalf v. Parry, 4 Camp. 124; Williams v. Shee, 3 Camp. 469, per Lord Ellenborough; Columbian Ins. Co. v. Cattlett, 12 Wheat. (U. S.) 383; Noble v. Kenneway, 2 Doug. 510-13; Hammond v. Reid, 4 Barn. & Ald. 72. See, also, Perkins v. Augusta etc. Ins. Co., 10 Gray (Mass.), 312; 71 Am. Dec. 354; Thorndike v. Boardman, 4 Pick. (Mass.) 471; United States v. Shearman, Pet.

Thus, where a policy upon a whaling voyage permitted a vessel "to stop at all ports and places for trade, refreshment, and recruits," it appeared that taking sea elephants was within the scope of such a voyage, and it was held that the clause did not restrict her from going into bays and along coasts and islands and staying there to take them.[95] So a liberty to proceed to certain islands for salt does not justify the vessel, after she has arrived at one of the said islands where salt may be obtained, in going thence to another island for the purpose of earning freight, even though she would have been compelled to wait four or five weeks for her turn in taking a cargo of salt, and by undertaking the voyage for freight she would be enabled to expedite her original voyage.[96] Although it is not a deviation to touch at a port at which the vessel has liberty to touch,[97] yet a liberty to touch, or to touch for all purposes, means a purpose connected with the voyage or in furtherance of the objects of the adventure, even though the port or place touched at be within the terms of the policy.[98]

§ 2394. Distinction between Purposes of Voyage and Acts Done to Insure Success of Adventure.—As substantially stated elsewhere, in all trading voyages the ship is, as a general rule, confined to the ports, places, or coasts designated in the policy, and cannot depart to other places merely

(C. C.) 98; Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J.; Chase v. Eagle Ins. Co., 5 Pick. (Mass.) 51.

[95] Child v. Sun Mut. Ins. Co., 3 Sand. (N. Y.) 26.

[96] Kettel v. Wiggin, 13 Mass. 68. Mr. Phillips, however, criticises this case as one for the jury rather than the court, and says the opinion has not "predominating weight" for said reason: 1 Phillips on Insurance, 3d ed., 580, sec. 1026. Notwithstanding this criticism, the case seems clearly one of deviation. The voyage undertaken was not for any purpose connected with the voyage insured and contemplated by the parties. The departure changed the risk, and substituted another voyage. Again, a departure cannot be justified to insure the success of the adventure. See Burgess v. Equitable M. Ins. Co., 126 Mass. 70.

[97] Cross v. Shutliffe, 2 Bay (S. C.), 220.

[98] Sully v. Whittemore, 5 Barn. & A. 45; Langhorne v. Allnott, 4 Taunt. 519, per Gibbs, J.; Hammond v. Reed, 4 Barn. & Ald. 72; Violet v. Alnutt, 3 Taunt. 419; Williams v. Shee, 3 Camp. 469, per Lord Ellenborough.

because she can better prosecute the trade elsewhere. There is a difference between departure as the result of a necessity, or for the purposes of the voyage, and a departure from the route to insure the success of a trading adventure, or the success of any mercantile or fishing voyage; such latter departure is not permitted, and, in the absence of a provision so to do in the policy, permission cannot be implied.[99] In Massachusetts it is held that a vessel which had sailed from Plymouth on a fishing voyage to the Banks was not justified in departing to St. Peters, the nearest available port, for that purpose, in order to procure bait, though she returned again to the Banks and did not suffer loss until after her return, and that such deviation avoided the policy. The case was distinguished by the court from those where the deviation is justified by necessity, and also from cases of delay in port or ports named or permitted in the policy, or delay necessary to accomplish the objects of the voyage.[100]

§ 2395. When Trading, etc., at Port may be Allowed, although not in Furtherance of Adventure.—There is a distinction between stopping at a port for a purpose not connected with or in furtherance of the main objects or purposes of the original adventure, and a case where the stopping was justified in the first instance, but some act is subsequently done which is foreign to the purposes of the main voyage or adventure. In the latter case, the rule may be thus generally stated: If a vessel under a liberty sufficiently broad, or through necessity, or for the purpose of necessary repairs and supplies, or for other sufficient cause, is so far justified, under the terms of the policy, in stopping at a port or place that such act is not a deviation or change of voyage, she may

[99] Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J., citing Kettel v. Wiggin, 13 Mass. 68; Robertson v. Columbia Ins. Co., 8 Johns. (N. Y.) 491.

[100] Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J., citing Elton v. Brogden, 2 Str. 1264; Driscoll v. Passmore, 1 Bos. & P. 200; Driscoll v. Bovil, 1 Bos. & P. 313; Clark v. United Ins. Co., 7 Mass. 365; Folsom v. Merchants' Ins. Co., 38 Me. 414; Columbian Ins. Co. v. Cattlett, 12 Wheat. (U. S.) 383; Phillips v. Irving, 7 Man. & G. 325; Noble v. Kenneway, 2 Doug. 510-13.

subsequently, whether the insurance is on the ship, goods, or freight, engage at said port or place in trade, load, or discharge goods and the like during such period as the purposes justifying her visit permit her to lawfully stay at said port or place, and this is so even though said acts of trading, etc., are not connected with or in furtherance of the main objects of the original adventure, nor within the express permission of the policy. In determining, however, whether such acts of trading, etc., are justified, it must be carefully considered whether the risk was thereby increased in whole or in part, or whether the stay was in whole or in part protracted thereby beyond the time during which the vessel would otherwise have been justified in remaining at such port or place. If there is any increase of risk or additional delay occasioned thereby, the policy is avoided, and it would also be proper, in ascertaining whether the risk has been increased, to weigh all the advantages and disadvantages, and if it was increased in one particular, but diminished in another of equal or greater degree, the policy might not be avoided.[101] But if a vessel which has been carried by capture into a port remains there for the pur-

[101] In Lapham v. Atlas Ins. Co., 24 Pick. (Mass.) 1, it appeared that a vessel was insured from West Indies to "port of discharge in the United States." The vessel sailed from West Indies for Savannah for the purpose of disposing of her cargo. She sustained some damage, stopped at Savannah, but did not discharge the cargo, but took on instead forty bales of cotton, and sailed for Boston, as a port of discharge. The court said: "It appears that while the vessel was at Savannah the master took on board forty bales of cotton on freight, and this, it is urged, released the defendants from their responsibility, but it has been settled by this court that the mere fact of putting goods on board a vessel at a port where she has a right to touch, if it neither increase the risk nor occasion delay, does not discharge the underwriter" : Conrick v. Gladstone, 11 East, 347; Chase v. Eagle Ins. Co., 5 Pick. (Mass.) 51; Kane v. Colorado Ins. Co., 2 Johns. (N. Y.) 264; Warre v. Miller, 7 Dowl. & R. 1; 1 Car. & P. 237; Hamilton v. Snedden, 3 Mees. & W. 49; Raine v. Bell, 9 East, 195; Hughes v. Union Ins. Co., 3 Wheat. (U. S.) 159; Delaney v. Stoddart, 1 Term Rep. 22; Lawcke v. Oswin, 12 East, 131; Kingston v. Girard, 4 Dall. (U. S.) 274; Inglis v. Vaux, 3 Camp. 437. The rule formerly contra, Sheriff v. Potts, 5 Esp. 95; Still v. Wardwell, 1 Esp. 610; Perkins v. Augusta etc. Ins. Co., 10 Gray (Mass), 312; 71 Am. Dec. 654; Thomas v. Royal Exch. Co., 1 Price, 195; Hughes v. Union Ins. Co., 3 Wheat. (U. S.) 159.

poses of trading, and for a longer time than is necessary to prepare for her voyage, it is a deviation.[102]

§ 2396. **Liberty of Ports—Course of Voyage—Change of Voyage.**—A liberty of ports is also governed by the principle that the vessel in visiting a port or ports must be confined to those properly in the course of the voyage described and embraced in the termini specified, as well also as for purposes connected with the objects of the voyage, and however general the liberty given may be as to its terms, it does not authorize changing the voyage.[103] And a liberty of ports and places does not justify making a distinct intermediate voyage, however wide the terms of such clauses may be.[104] The general words of the policy may extend the liberty to both the outward and the homeward voyage, and to all places whatsoever in the usual course thereof to and from the place mentioned,[105] or the permission to stop at uncertain ports may be limited to the homeward voyage by the terms of the policy, and by the words in which the permission is indorsed on the policy.[106] The liberty may be of such a character, in connection with the words of the policy, that the vessel is limited to a particular port of an island; as where the insurance was "at and from" a designated port, "thence to a port on the north side of Cuba, with liberty of a second

[102] Kingston v. Girard, 4 Dall. (U. S.) 274.

[103] Lavabre v. Wilson, 1 Doug. 284; Hogg v. Horner, reported with the last case in 1 Marshall on Insurance, ed. 1810, 192, *191; Gardner v. Sennhouse, 3 Taunt. 16; Seccomb v. Provincial Ins. Co., 10 Allen (Mass.), 305; citing Stoker v. Harris, 3 Mass. 409; Bottomley v. Bovil, 5 Barn. & C. 210; Solly v. Whittemore, 5 Barn. & A. 45; Kettel v. Wiggin, 13 Mass. 68. "Such clauses, however wide their terms may be, never give the right of changing the voyage insured. . . . . Caesarigis well remarks that the captain in using the liberty given him in the policy is never to lose sight of the voyage entered upon": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 6, p. 553.

[104] Bottomley v. Bovil, 5 Barn. & C. 210; Robertson v. Columbian Ins. Co., 8 Johns. (N. Y.) 491; Seccomb v. Provincial Ins. Co., 10 Allen (Mass.), 305.

[105] Lavabre v. Wilson, 1 Doug. 284, reported also in 1 Marshall on Insurance, ed. 1810, 192.

[106] Perkins v. Augusta etc. Ins. Co., 10 Gray (Mass.), 312; 71 Am. Dec. 654.

port thereon," here the latter clause will be construed to mean a second port on the north side of the island, and visiting a port on the south side discharges the underwriters.[107] And it is held that the vessel may not deviate from the course even for a purpose connected with the voyage insured,[108] although a departure from the course may, as will be seen from the cases noted elsewhere, be justified under a sufficiently extensive liberty when done for a purpose connected with the voyage insured. Thus, the limited construction of the liberty given in the above cases will not be followed, however, where it is clearly evident from the whole policy that a broader or more extensive liberty was intended, and a policy may be so worded that the vessel may stop at ports or places in either of two routes, or sail backward or forward upon some intermediate voyage for the purpose of accomplishing a voyage to the terminus of either route, but even in such case, if the vessel was upon neither route of the two contemplated, nor upon an intermediate voyage with a view to accomplish a voyage to the terminus of either route, the insurers are discharged.[109] And in cases of insurances at and from or to the West Indies Islands, thence home, the liberty to call at, or touch and stay at, all or any of the islands or ports or places therein, is not so strictly limited, in view of the character of the voyage, as in those instances first above noted, reference, however, being had

[107] Nicholson v. Marine Ins. Co., 106 Mass. 399.

[108] Hogg v. Horner, reported in 1 Marshall on Insurance, ed. 1810, 192, *191.

[109] Bottomley v. Bovill, 5 Barn. & C. 210; 7 Dowl. & R. 702; 4 L. J. K. B. 237. Emerigon says that Pothier "thus expresses himself: 'When a policy contains a clause that it shall be permitted the master of the vessel to navigate to the right or to the left to make a port, to go and to return, this clause certainly allows the assured to turn aside from the route, to touch on the right or on the left, to discharge goods there, and to ship others in their stead, to go and return from one port to the other even in retrograding, or that the vessel shall return to its route for the purpose of reaching the destination expressed in the policy, but it does not allow him to entirely change the voyage.'" And he adds: "The contract must be interpreted in view of the principal object that has dictated it, and in doubt it must be understood with reference to principles of law and to the practice of commerce": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 6, pp. 554, 555.

to the purposes of the voyage in determining whether there has been a deviation.[110] Again, where a vessel was insured "at and from" Santa Marca, a port on the Spanish main, to New York, with a liberty to use "three additional ports from the Spanish main to New York," it was held that the vessel might touch at three ports on the main within the limits of the voyage insured, and was not confined to ports on the homeward voyage after leaving the main.[111] So a liberty of ports and places coupled with the purposes and nature of the voyage may justify sailing backward and forward from port to ports or places, and warrant intermediate voyages.[112]

§ 2397. **Liberty of Ports—Trading, Discharging, or Taking in Cargo.**—Trading, discharging, or taking in cargo under a liberty of ports or places must be governed by the principles stated under the last section, reference always being had to the extent of the liberty given and construed with reference to the principal object that has dictated the contract, as well as the practice of commerce. But if the clauses are precise and clear, interpretation becomes unnecessary, and the parties must be bound by the terms stipulated, for it is lawful to insert clauses permitting extensive liberty to navigate in any direction, even though the vessel under them may go out of the usual course, provided the departure is in the prosecution of the original adventure or for the voyage insured, or for the accomplishment of the purposes of the voyage insured.[113] If

[110] See Metcalf v. Parry, 4 Camp. 123; Bragg v. Anderson, 4 Taunt. 229; Barclay v. Stirling, 5 Maule & S. 6.

[111] De Peyster v. Sun Mut. Ins. Co., 19 N. Y. 272; 13 Barb. (N. Y.) 307; 75 Am. Dec. 331.

[112] Ashley v. Pratt, 16 Mees. & W. 471; affirmed, 1 Exch. 257; Armet v. Innes, 4 J. B. Moore, 150. See secs. 2387, 2395, herein.

[113] See Arnott v. Innes, 4 J. B. Moore, 150, per Park, J.; Williams v. Shee, 3 Camp. 469, per Lord Ellenborough; Hammond v. Reed, 4 Barn. & Ald. 72; Bottomley v. Bovil, 5 Barn. & C. 210. "If the parties have explained themselves on the point in a precise, special and clear manner, interpretation becomes superfluous; cum in verbis nulla est ambiguitas non debit admittii voluntatis quæstio; and the stipulated agreement must be adhered to. The indefinite clause of being at liberty to navigate in any direction is lawful"; Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 6, pp. 555, 556.

a liberty is given to touch one or more times at ports beyond the Cape of Good Hope to sell the outward and procure a homeward cargo, thence to the port of final discharge, the vessel may go to the port, sail thence to another to sell her cargo, return to the first port to trade, and may also sell the homeward cargo at one port and proceed thence to another to take in a whole cargo, such acts being done in good faith, and in furtherance of purposes of the voyage, and not changing the risk.[114] So, also, where a vessel was insured under a policy which gave a liberty to sail forward and backward to the ship's loading ports in designated localities, but which also gave permission to proceed and sail, touch and stay, at any ports or places whatsoever and wheresoever, for any purpose whatsoever, it was held that the ship might trade at any ports or places within the limit designated, even though out of the limits of the direct course, and also exchange part of her homeward cargo for other goods, such acts being in pursuance of and consistent with the purposes of the voyage. It was also decided that the terms of the policy, coupled with the relative geographical distances of the designated ports and places and the order specified in the policy, evidenced that such liberty to trade and discharge must have been contemplated in the case.[115] A mere liberty to touch gives a liberty to trade where it is evident that the parties so intended, or where the nature of the voyage renders it necessary.[116] If the liberty given only extends the protection of the policy to the loading of goods on board, the vessel is not justified in stopping to deliver goods, for such purpose is wholly unconnected with the main object of the adventure, although if she had gone to the same port to see if she could get a cargo it would not have been a deviation.[117] If under an insurance on a return cargo

[114] Thorndike v. Bordman, 4 Pick. (Mass.) 471.

[115] Arnot v. Ines, 4 J. B. Moore, 150; Solly v. Whittemore, 5 Barn. & A. 45, noted below in text, and criticism thereon in note below.

[116] Urquhart v. Bernard, 1 Taunt. 450; Chase v. Eagle Ins. Co., 5 Pick. (Mass.) 51; Metcalf v. Parny, 4 Camp. 124. Formerly contra, United States v. The Paul Shearman, Pet. (C. C.) 98.

[117] Solly v. Whitmore, 5 Barn. & A. 45. Mr. Phillips criticises the application of the doctrine of this case as questionable, on the ground

"from and immediately after the loading thereof" at the port of destination, a liberty of intermediate ports will not protect the outward cargo from the port of destination to one of the intermediate ports, where the vessel is refused admission at the port of destination.[118] In another case a vessel was insured from New York to Teneriffe, and, for an additional premium, permission was given to proceed from Teneriffe to the Isle of May and Bonavista and at and from thence to New York, but she was refused permission to enter or land any part of the cargo until after performing a quarantine of forty days, which the master, not choosing to do, went to Madeira, the nearest point where he could enter and land his cargo, and then sold and delivered the cargo and proceeded to the Isle of May, and it was held that the going from Teneriffe to Madeira was a deviation.[119] In this last case the voyage undertaken was for the purpose of benefiting the assured, and not to further any purpose connected with the voyage. But the vessel is not confined to the usual and direct course of the voyage between the termini, but may take in goods at a port so outside the course where the main object of the adventure is to be furthered and the liberty is sufficiently broad; as in a case where permission was given to touch, stay, and trade at all or any places whatsoever and wheresoever, and to touch and stay at any ports or places whatsoever in any direction and for any purpose, necessary or otherwise.[120]

§ 2398. Liberty of Ports and to Tow and Assist Vessels.—A liberty to visit any port or ports for any purpose whatever and to tow and assist vessels in all situations must be construed to mean all ports in the course of the voyage described, or to tow and assist all vessels to be met with

that it could not have been intended that the ship should go out empty, and that the delivery of a cargo must have been deemed as one of the probable purposes for touching (1 Phillips on Insurance, 3d ed., 566, sec. 1007), and there is much force in this criticism. See Arnot v. Innes, 4 J. B. Moore, 150, noted above.

[118] Graves v. Marine Ins. Co., 2 Caines (N. Y.), 339.

[119] Robertson v. Columbian Ins. Co., 8 Johns. (N. Y.) 491.

[120] Hunter v. Leathley, 10 Barn. & C. 858; 7 Bing. 317.

in such course. This was so held in the case of a chartered vessel where the liberty was given in the bill of lading and not in the charter.[121]

§ 2399. **Liberty to Touch and Stay or of Port or Ports may be Limited by Other Words in Policy.**—Although the voyage be described and a general liberty be given to touch and stay at any and all points and places, this liberty may be limited by other words in the policy so as to expressly confine the ship to ports and places in the usual course of the entire voyage; as where the insurance was from L. to P., M., and C., and back, with liberty to touch at designated ports, and also at all and any ports and places whatsoever, and these words are followed by the clause "and in the outward and homeward bound voyage" to touch and stay at any ports and places, the latter clause will control the former, and limit the liberty as above stated.[122] So where the insurance was on cargo to Bremen, with liberty to enter a Dutch port, when informed on arriving on that coast that it could be done in safety, limits the privilege of departing from the course except under strict compliance with the terms of the limitation.[123] In another case a vessel was insured upon a voyage described as "from New York to Gibraltar, at and from thence to Tarragona, with the liberty of using one port between Tarragona and Gibraltar, and at and from thence to New York." Four months later permission was indorsed on the policy "to stop at one other port between Tarragona and Gibraltar." It was held that, considering the manner of expression used in giving the permission and the time it was given, the permission was to be availed of on the homeward voyage; that the assured was privileged to stop at one port between Tarragona and Gibraltar, but that he had no right to stop at Gibraltar.[124]

[121] Arden S. S. Co. v. Thebaud, 35 Fed. Rep. 620. See sec. 2427, herein.

[122] Lavabre v. Wilson, Doug. 284.

[123] Duerhagen v. United States Ins. Co., 2 Serg. & R. (Pa.) 309.

[124] Perkins v. Augusta etc. Ins. Co., 10 Gray (Mass.), 312; 71 Am. Dec. 654.

§ **2400. Prohibited Ports.**—If certain waters or ports are prohibited between certain dates, this constitutes a warranty that the ship will not enter said waters nor use those ports during the period specified.[125] But although a warranty not to use a certain prohibited port means not to go into it, it does not prevent going near to, or in the direction of said port, even with an intent to enter it, for a mere intention to use a prohibited port does not violate the warranty.[126] If the printed part of a policy warrants that certain ports, places, and designated waters shall not be used, among them ports and places in Texas, except Galveston, and foreign ports and places in the Gulf of Mexico, and by indorsement in writing on the policy the vessel is permitted to be "employed in the coasting trade on the United States Atlantic coast," and also to use gulf ports not west of New Orleans, this does not permit of a voyage from Maine to a port in the Gulf of Mexico, west of New Orleans, so as to enable assured to recover for a loss on said voyage occurring west of New Orleans.[127] Again, a vessel insured on time, with a warranty in the policy not to use any ports of Mexico except Laguna, touched there, and in order to enter there, in accordance with the commercial regulations of Mexico, went to another port to enter and pay tonnage duties. It was held that there was such a deviation and breach of warranty as to avoid the policy.[128]

§ **2401. Liberty of Ports where Employment of Ship is Limited by the Policy.**—If it is clearly apparent from the terms of the policy that the ship is to be employed for a specific purpose, a liberty of ports and places or to touch and stay must be construed, however broad it may be, with reference to the intended employment, and to engage the ship in a totally different employment, whereby the risk is changed,

[125] Odiorne v. New England etc. Ins. Co., 101 Mass. 551; 3 Am. Rep. 401; Cobb v. Lime Rock Ins. Co., 58 Me. 256. See secs. 2372-74, herein.

[126] Snow v. Columbian Ins. Co., 48 N. Y. 624; 8 Am. Rep. 578.

[127] New Haven Steam Mill Co. v. Security Ins. Co., 20 Blatchf. (C. C.) 192.

[128] Stevens v. Commercial etc. Ins. Co., 26 N. Y. 397.

is a deviation. This was so held in a case where it was evident that the ship was to be employed as a tender to other ships in a certain trade.[129]

§ 2402. **Not Touching at Privileged Port.**—It is not a deviation for a vessel not to stop at a port at which she has a privilege to call in the course of the voyage, because such a privilege was intended as a benefit for the insured, which he may waive for the general interests of all concerned, if he sees fit.[130] If a policy of insurance authorizes the ship to stop at a particular port, the insured need not disclose that the ship will call there, although he has information of the fact.[131]

§ 2403. **River Navigation—Departure from River Channel.**—It is not a deviation to depart from the usual channel in sailing up a river.[132]

§ 2404. **River Navigation—Vessel may Make Usual Stops for Landing and Loading Goods, etc.**—A vessel may undoubtedly be permitted to make such usual stops for landing or loading goods, discharging or taking on passengers, and the like, as are necessary and contemplated from the character of the voyage.[133]

[129] Hamilton v. Shedden, 3 N. & W. 49. See, also, Hartley v. Buggin, 3 Doug. 39, reported in 1 Marshall on Insurance, ed. 1810, 200, where Lord Mansfield said: "If a ship insured for a trading voyage be turned into a floating warehouse, or a factory ship, the risk is different. It varies the stay, for while she is used as a warehouse, no cargo can be bought for her. This is the law. The fact is that though this was not a regular thatched factory ship, yet she was used as a thatched factory ship is used. This being clear, it follows that the risk is different in point of length from that which is generally understood in the trade, and consequently from that which was insured." And converting the vessel into a factory ship, or receiving ship for slaves, was therefore held a deviation. The ship was also delayed seven months beyond the usual time of vessels engaged in the trade.

[130] Cross v. Shurtleff, 2 Bay (S. C.), 220; 1 Am. Dec. 645. See Marsden v. Reed, 3 East, 572; Hale v. Mercantile M. Ins. Co., 6 Pick. (Mass.) 172.

[131] Hubbard v. Coodidge, 2 Gall. (C. C.) 353.

[132] Keeler v. Fireman's Ins. Co., 3 Hill (N. Y.), 250.

[133] Lockett v. Merchants' Ins. Co., 10 Rob. (La.) 339; Laury v. Russel, 8 Pick. (Mass.) 360.

§ **2405. Masters and Mariners—Negligence or Mismanagement—Remote Cause.**—If the proximate cause of the loss is one of the perils insured against, the fact that the remote cause may be traced to the masters or mariners does not release the insurers, but a voluntary deviation by the master is not such a remote cause as to bring it within the rule.[134] A departure to obtain water, the necessity for which was caused by the negligence of one of the seamen in losing the water from a cask, is not such a deviation as will avoid the policy, unless, perhaps, it be proven that the neglect occurred during the master's unjustifiable absence.[135] The act of lashing a flatboat, ascending the Mississippi and laden with produce, to a steamer for towing is of itself a violation of the contract of insurance, but if, after a collision with the steamer, the master, with the honest intention of averting imminent danger of loss, causes such flatboat to be lashed to and taken in tow by the steamer to the nearest landing, the underwriters are not thereby discharged.[136]

§ **2406. Departure from Course through Ignorance of Master.**—A departure from the course, to constitute a deviation, should be voluntary, yet if it takes place through the master's ignorance, it will be deemed voluntary and a deviation, although a mere honest mistake of judgment, where the exercise of a discretion is required in taking the ship out of the course, made by a skillful, discreet, and prudent master, will not constitute a deviation.[137]

§ **2407. Master's Judgment and Discretion.**—The master must be the principal judge of the degree of peril to which his ship is exposed, of her ability to withstand the same, of the necessity of departing from the usual course of the voyage,

[134] Natchez v. Stanton, 2 S. & M. (Miss.) 340; 41 Am. Dec. 592. See sec. 2167, herein.

[135] Lapene v. Sun Mut. Ins. Co., 8 La. Ann. 1.

[136] Stewart v. Insurance Co., 1 Humph. (Tenn.) 242.

[137] Phynn v. Royal Exch. Co., 7 Term Rep. 505; Yost v. Levil. 4 East, 481; Brazier v. Clapp, 5 Mass. 1, per Sedgwick, J.; Turner v. Protection Ins. Co., 25 Me. 551. See the following section.

and whether the ship may safely proceed to a nearer or more distant port for repairs, and also which port offers, under the circumstances, the greatest facility for repairs. If he acts in good faith, and has no other purpose but to conduct the vessel by the safest and shortest course to her selected port of necessity, such acts are within the spirit of the contract, and will be protected thereby, and the deviation justified. In brief, if the master, being one of ordinary skill and discretion, acts in good faith and forms the best judgment he can under the existing circumstances, having in view the safety of lives on board and next thereafter the security of the property intrusted to him, it is all that the contract can be reasonably held to require, and, if the safety of life and property require it, the master should seek the nearest land accessible without needless delay or divergence from the course thereto.[138] So if a master being obliged to repair his vessel, returns to port and acts with good faith and sound discretion, there is no deviation.[139] And the master may, therefore, depart from the usual course for the purpose of saving life, ship, or property, if necessity or reasonable cause impels him thereto. There is in every policy an implied consent and authority to the master so to do, whether the urgent danger which it is sought to avoid be a peril insured against or not.[140]

§ **2408. Instructions to Master—Generally.**—The master's discretion as to the mode of prosecuting the voyage or of the course to be pursued may be limited to the instructions of the owner of the ship, for it is the master's duty to follow

[138] Turner v. Protection Ins. Co., 25 Me. 515; 43 Am. Dec. 294; Brazier v. Clapp, 5 Mass. 8, per Sedgwick, J.; Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73.

[139] Wiggin v. Amory, 13 Mass. 118.

[140] Wiggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; D'Aguilar v. Tobin, Holt N. P. 185; Reade v. Commercial Ins. Co., 3 Johns. (N. Y.) 352; Goyon v. Pleasants, 3 Wash. (C. C.) 241; Graham v. Commercial Ins. Co., 11 Johns. (N. Y.) 352. "The deviation is proper when made in good faith and upon reasonable grounds of belief in its necessity to avoid a peril": Deering's Annot. Civ. Code Cal., sec. 2695, subd. 3.

instructions, even though his own judgment might not approve of the course prescribed.[141]

§ **2409. Departure from Route to Avoid Seizure in Pursuance of Instructions.**—If the instructions evidence a prudent exercise of discretion, they may permit the vessel's going out of the most usual and least dangerous route to avoid a peril; as where under an insurance from New York to Bordeaux the owners, being apprehensive of detention by British cruisers, instructed the master to go through the sound, instead of through the narrows, to the Hook, which latter was the usual course and least dangerous. In this case the owners were on the spot, and were probably most competent to judge of a danger, and there was no reason or necessity for consulting the master.[142]

§ **2410. Liberty of Ports for Orders—Revisiting Port.** A vessel may be insured with liberty of ports for orders, and under such a policy, coupled also with the liberty of ports for any purpose whatever, the ship touched at Carlsham for orders, in pursuance of which she proceeded to Schwinnemunde for orders, off which she arrived, and receiving instructions to return to Carlsham because it was unsafe to land at Schwinnemunde, and while undergoing repairs, her cargo was seized, it was held no deviation.[143]

§ **2411. Visiting Port for Information or Orders.**—If a vessel is insured to either or both of two ports, and one port is elected as that of the ship's destination, but the vessel is temporarily prevented from entering, it does not constitute a deviation for the master to put into a third port to ascertain to which of the two ports he had better visit.[144] And a ship

[141] 2 Duer on Marine Insurance, ed. 1846, 491, sec. 59. See Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.), 46, per Kent, Ch.

[142] Reade v. Commercial Ins. Co., 3 Johns. (N. Y.) 352. See sec. 2176, herein.

[143] Andrews v. Mellish, 5 Taunt. 496; affirming 2 Maule & S. 27. See Mellish v. Andrews, 16 East, 312; 15 East, 4.

[144] Clark v. United Ins. Co., 7 Mass. 365; 5 Am. Dec. 50.

insured to a port of discharge on a certain coast may stop at a port on said coast for the purpose of ascertaining the state of the market, and to enable the master to determine whether he will discharge there or proceed to another port. And the vessel may proceed thence to that port of discharge which promises the best sales; he is not obliged to discharge at the first port.[145] But even an extensive liberty to call at certain places must be limited to the calling for purposes connected with that particular voyage, and it is a deviation to call for the purpose of obtaining information to be used for the purpose of another voyage in no way connected with that insured.[146]

§ 2412. Delay or Departure from Route for Political Information.—Delay for a few days at an intermediate port was held not a deviation, when it was for the purpose of obtaining news from Mexico, with which country we were then at war, and the next port was on the Rio Grande, though under the control of our troops.[147] Under certain English decisions covering what were known as Baltic risks, arising from the political exigencies brought about by Napoleon's continental system, and under which policies the risk was to a port or ports in the Baltic, backward or forward, with liberty to touch and stay at any or all ports or places for all purposes, it was held that the liberty was sufficiently broad to permit putting into a port to ascertain the political state of other ports, and under a very similar policy where the liberty was extended to call for orders, and the vessel had not selected her port of discharge, it was held that she might call twice at the same port for orders.[148]

§ 2413. Delay to Await Orders as to Port of Discharge under Permission in Policy.—A vessel may, under terms of the policy, be justified in a delay to await instructions;

[145] Lapman v. Atlas Ins. Co., 24 Pick. (Mass.) 1; Coolidge v. Graff, 8 Mass. 537.

[146] Hammond v. Reed, 4 Barn. & Ald. 72.

[147] Bradley v. National Ins. Co., 3 La. Ann. 708; 48 Am. Dec. 465.

[148] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 374, *369; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 475, citing

as where a policy was upon goods consigned to A upon vessels from Santos to New York, Baltimore, or Boston direct, "or via Hampton Roads for orders," and it was held that the vessel was justified in delaying eighteen days at Hampton Roads for orders, and there was no deviation. It further appeared that the master wired A his arrival, and received a letter directing him to await instructions, and A and his agents during the period of delay were endeavoring to sell the cargo at either port of discharge, but without success. It was further decided that a reasonable time for selling the cargo was permissible, and the delay therefore excusable. It was also decided that an indorsement of the policy, whereby it was agreed that an extra premium should be paid in case a vessel used a port of call exceeding seven and not over fifteen days, justified a construction of an understanding that there might be a delay of fifteen days at Hampton Roads.[149]

§ 2414. Instructions to Deviate—Whether must be Disclosed.—A question has arisen whether the assured is not obligated to disclose to the underwriter instructions given to the master, and whether, in case of failure so to disclose the same, the underwriter is released by the concealment, or only from the time of the actual deviation. Mr. Duer is of the opinion that inasmuch as the master is obligated to follow instructions to deviate, and such instructions are concealed from the underwriter, the risk never attaches,[150] and such seems to be substantially the English rule as stated by Mr. Arnould,[151] under which the case relied on is that of a voyage "at and from" London to Jamaica. The master was instructed to touch Cape St. Nicholas mole for the purpose of landing

Rucker v. Almott, 15 East, 278; Mellish v. Andrews, 2 Maule & S. 26; Andrews v. Mellish, 5 Taunt. 495. See Id., 15 East, 4; 16 East, 312.

[149] Arnould v. Pacific Mut. Ins. Co., 78 N. Y. 7.

[150] 2 Duer on Marine Insurance, ed. 1846, 491-99, where he reviews Middlewood v. Blakes, 7 Term Rep. 158; Talcott v. Marine Ins. Co., 2 Cranch (U. S.), 274; Silva v. Low, 1 Johns. (N. Y.) 193; 3 Benecke & Rossetti, 92-94; Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46, per Kent, Ch.; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241; Marine Ins. Co. v. Tucker, 3 Cranch (U. S.), 357.

[151] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 560, 561, *557, citing Middlewood v. Blakes, 7 Term Rep. 158.

stores. Up to a certain point the voyage was over the same route; from there on there were three courses, two to the southward and one to the north of San Domingo, of which three courses the master was by usage permitted a choice, although the usual and safest of the courses were the southern routes. The vessel was captured on the northern course before she had turned off for St. Nicholas' mole, and it was held that the instructions had taken away the master's discretion, and the concealment of the intention to go to St. Domingo released the underwriters.[152] It is noteworthy that in this case the ship had passed the point of divergence of the three routes before she was lost, and it is doubtful from the general tenor of the opinions given if the court would have released the insurers had the vessel been lost before the dividing point was reached. It is true that the proposition is applicable that the insurers have a right to rely upon the master's judgment and discretion in choosing the safest and most expeditious route, under the circumstances, existing at the time when the dividing line is reached. But it is doubtful if it is necessary to disclose whether it is intended to rely upon the master's judgment or not. Assume that such instructions were withdrawn before the dividing point was reached. In what respect does it then differ from an intention to deviate? Again, is not the fact one of which the insurer waives being informed, and, therefore, to be placed in the same category with cases under the rule which does not require the disclosure of information respecting seaworthiness? It seems most reasonable, in view of the whole tenor of the court's opinion in the above English case, as well as in consideration of what is declared by eminent authority in this country, to hold that the question is not one of concealment merely, but one as to whether there has been a change of the voyage or mere intention to deviate, as governed by the principles applicable to the determination of the questions.[153]

[152] Middlewood v. Blakes, 7 Term Rep. 158. Lawrence, J., however, did not consider this ground tenable.

[153] Talcot v. Marine Ins. Co., 2 Johns. (N. Y.) 136; New York F. Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46, per Kent, Ch.; Houston v. New

§ 2415. Whether an Act be Deviation, Change of Voyage, or Barratry.—Whether an act be a deviation or barratrous must, as will be seen from the definition of barratry hereafter given, depend primarily upon whether it was done by the master in his character as such, or by the mariners with a fraudulent or criminal intent to damnify the owners, or the charterers of the ship, who are owners pro hac vice. Where the act is in pursuance of the owners' instructions, or with their knowledge and consent, or for their interest and benefit, this is an important factor. Barratry does not cover acts done through mere ignorance of the master or through his carelessness. It does, however, comprehend gross malversation in office by the master, any willful cheat or fraud, or willful act of known illegality, breach of trust with a dishonest purpose to prejudice the owner, and gross negligence amounting to criminality. A willful deviation for the benefit of the owners is not barratry;[154] nor is the conduct of the master barratrous in deviating by directions of the ship-owners, notwithstanding the owner might be liable to the owners of goods insured;[155]

England Ins. Co., 5 Pick. (Mass.) 89; Reade v. Commercial Ins. Co., 3 Johns. (N. Y.) 352. See Henshaw v. Marine Ins. Co., 2 Cranch (U. S.), 274. "It is not necessary to the validity of the insurance at the outset that the assured should disclose his intention to enhance or vary the risk described in the policy at some intermediate stage. Such enhancement or change affects the policy, if at all, as a deviation, and not as a concealment" : 1 Phillips on Insurance, 3d ed., 18, 319, sec. 582. And in another place the same author says: "I do not see how the case (viz., Middlewoods v. Blakes) can be distinguished from any other of an originally intended deviation . . . . or unjustifiable delay, or other originally intended forfeiture of the policy." And also that Mr. Arnould's references do not support the construction given this case: Id. p. 550, sec. 992, note 4. See, also, 1 Parsons on Marine Insurance, ed. 1868, 486, 487, note 1. See secs. 2375, 2377, herein. Mr. Maclachlan says of Middlewood v. Blakes that if the intention to send the ship to St. Nicholas mole was formed after the policy was effected, it was merely an intention to deviate, and not a change of voyage, as Jamaica was not lost sight of as the terminus ad quem, but that if it was formed definitely when the policy was effected, as he inferred it to have been, the policy never attached. "And to call the absence of any mention of St. Nicholas mole a concealment seems, under these circumstances, a misuse of language" : 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 461, n. 2.

[154] Dederer v. Delaware Ins. Co., 2 Wash. (C. C.) 61.

[155] Nutt v. Bourdieu, 1 Term Rep. 323.

nor is proceeding on the wrong course, owing to the master's gross ignorance, a barratrous deviation, there being no fraud or criminality.[156] And where a ship had been piratically taken off by its crew, and the master of a vessel was to receive for her recapture a part of a certain sum of money, dependent as to his proportion of said amount upon the owner's pleasure, and departed from his course in pursuit of the sloop, this was held a deviation, and not a barratrous act, there being an absence of fraud or criminal conduct.[157] So if the master, owing to a misunderstanding or mistake as to sailing instructions, sails on a different voyage not warranted by the contract, such act is not barratrous;[158] and delay at a port of distress is not a deviation, but barratry, when the master while there procures forged papers, changing the ship's name and absents himself longer than necessary, and then runs away with the vessel, and the barratrous act commences, in such case, with this delay.[159] A deviation which is the voluntary, illegal, and fraudulent act of the master, done without the knowledge or consent of the owner, pro hac vice is barratrous.[160]

§ **2416. Vessel Forced to Deviate by Barratrous Acts.** If barratry is one of the perils insured against, it is not a deviation if the vessel is taken out of her course by the barratrous act of her master.[161]

§ **2417. What Justifies Deviation Generally—Code Provisions.**—As will be apparent from the several sections under this chapter, the terms of the policy may warrant

[156] Pyn v. Royal Exch. Co., 7 Term Rep. 505; Earle v. Rowcroft, 8 East, 139, per Lord Ellenborough.

[157] Hood v. Nesbitt, 2 Dall. (Pa.) 137; 1 Yeates (Pa.), 114; 1 Am. Dec. 265.

[158] Bottomley v. Bovil, 5 Barn. & C. 210.

[159] Roscow v. Corson, 8 Taunt. 684.

[160] Vallezjo v. Wheeler, Cowp. 143; Lofft, 631. See further as to what is a departure from the voyage and what barratry, Martin v. Delaware Ins. Co., 2 Wash. (C. C.) 254; Glidden v. Manufacturers' Ins. Co., 1 Sum. (C. C.) 232; West v. Columbian Ins. Co., 5 Cranch (C. C.) 309; Buckley v. Protection Ins. Co., 2 Paine (C. C.), 82.

[161] McIntyre v. Browne, 1 Johns. (N. Y.) 299. In this case the master agreed with the charterers for a stated sum to deviate.

what would otherwise be a deviation. It is, therefore, material to ascertain, in the first instance, the exact terms of the policy and the character and nature of the voyage. If the act claimed as a deviation be not one within the permission of the policy, it should be determined whether there is a necessity or other justifying cause, having in view the fact that deviation is a voluntary act. The main question to be considered in all cases is the nature and extent of the necessity, or justifying cause which will warrant a departure from the usual course, or whether the delay has been reasonable and necessary under the particular circumstances or to accomplish the purposes of the voyage. Another point is whether the ship has departed further than the necessity requires, and the judgment and discretion of a master of competent skill and prudence also constitutes an important factor. A deviation will not, as we have seen, be justified to insure the success of the adventure, as distinguished from the purposes of the voyage, nor for mere purposes of commerce. The necessity which justifies a deviation must be a real and inevitable one, or reasonable ground must exist for believing it urgent, and must not be created by the assured or any agent of his.[162]

[162] Crousillat v. Ball, 4 Dall. (C. C.) 294; 3 Yeates (Pa.), 375; Scott v. Thompson, 4 Bos. & P. 181; Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 89, per Kent, Ch.; Mutney v. Haven, 13 Mass. 172; Neilson v. Cal. Ins. Co., 1 Johns. (N. Y.) 301; Greene v. Pacific Ins. Co., 9 Allen (Mass.), 217; Kettel v. Wiggin, 13 Mass. 72; Driscoll v. Bovil, 1 Bos. & P. N. R. 200; Cruder v. Philadelphia Ins. Co., 2 Wash. (C. C.) 262; Phillips v. Irving, 13 L. J. Com. P. 145; Brazier v. Clapp, 5 Mass. 9, per Sedgwick, J.; Oliver v. Maryland Ins. Co., 7 Cranch (U. S.) 493; Miller v. Rossell, 1 Bay (S.C.), 309; D'Aguilar v. Tobin, Holt N. P. 185; Lapene v. Sun Mut. Ins. Co., 8 La. Ann. 1; 58 Am. Dec. 668; 1 Marshall on Insurance, ed. 1810, 205. "A deviation never puts an end to the insurance, unless it be a voluntary act of those who have management of the ship": Scott v. Thompson, 4 Bos. & P. 181, per Mansfield, C. J. "Change of route occasioned by tempest, to avoid dangers of ground, to fly an enemy, or through other perils of the sea, alters in no respect the insurance. The loss suffered in the route are at the charge of the insurers" : Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 15, p. 576. "In all cases the necessity must be a real and imperative necessity, affecting the vessel, such as actual force preventing the master from exercising his will, peril of the sea, danger of capture, want of repairs, disability of the crew, or unseaworthi-

Under the California code a deviation may be justified, by circumstances over which neither the owner of the ship or the master has any control, in cases where it is necessary to comply with the warranty, or to avoid a peril, whether insured against or not, where reasonable grounds exist that it is necessary to avoid a peril, to save human life, or relieve a vessel in distress, provided that in these last cases it is made in good faith, but is not justified in any other cases than those herein specified.[163] A deviation will be justified by necessity in case of an insurance against a particular risk, as well as in the case of a general insurance.[164] But where necessity sanctions a deviation, the deviation must be strictly commensurate with the vis major which causes it.[165] A necessity for a deviation is not in all cases to be tested by the result. If, under the circumstances, there is a justifiable ground, it is sufficient.[166] The master is not obligated to sacrifice a deckload before deviating for a port of necessity.[167] A deviation may, as will be noted hereafter, be justified by compulsion a second time,

ness, occurring under such circumstances that the master, acting upon his best judgment for the interest of all parties, has no alternative, and is forced to leave his route or delay its prosecution. Where the departure is caused by such a necessity, the change of route in no respect alters the insurance, because the course of a sea voyage must at times be necessarily subject to extraordinary perils of the sea and contingencies beyond the control of the master, and in the presence of which he is forced to succumb; and when they occur and he is obliged to depart from the usual course of the voyage, there is no deviation in the legal sense of the term, for the departure is the necessary incident of the route named in the policy as prosecuted at the time by the ship. The probability of such occurrences is well understood; they are known perils of the voyage, and enter into the ordinary contract of marine insurance. And when the master, compelled by the necessity, does that which is for the benefit of all concerned, the act is within the intention of the policy as much as if expressed in terms": Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J. As to "unseaworthiness," noted in this quotation, see secs. 2180-83, 2390, herein.

[163] Deering's Annot. Civ. Code Cal., secs. 2695, 2696.

[164] Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 89.

[165] Maryland Ins. Co. v. Leroy, 7 Cranch (U. S.), 26. "The deviation and extent of it must be warranted by the degree of the necessity": 1 Marshall on Insurance, ed. 1810, 205.

[166] Byrnes v. Louisiana State Ins. Co., 19 Mart. (La.) 126.

[167] American Ins. Co. v. Francia, 9 Pa. St. 390.

by the necessity for repairs, to save life, to avoid certain dangers, to relieve ships in distress and in other cases.

§ **2418. Effect of Usage and Exigencies of Trade.**— If the deviation is justified by a uniform and well-established usage, or the exigencies of trade, in which the vessel is engaged, are such as must have been in the contemplation of the parties from the character of the trade, or if the mode of trading is usual to vessels of that description, or if the voyage is according to usage, the insurers will not be released, although the deviation might not have been justified in the absence of such usage, but usage which will justify a deviation must be so certain and generally known as to raise the presumption that it was generally known as the law of that trade.[168] And although the termini and intermediate ports are named, such description does not preclude stopping at other intermediate ports which by the course of navigation or the usage of trade are usually stopped at in such voyages, unless the terms of the policy expressly exclude the usage.[169] So usage may warrant a return to a port from which a vessel has sailed; as where custom permits of a return for clearance, [170] and the master may by usage be permitted a choice of certain routes.[171] A delay which is necessary, in accordance with the course of trade, to accomplish the purposes of the voyage is not such a deviation as will avoid the insurance on a round voyage.[172]

[168] Child v. Sun Mut. Ins. Co., 3 Sand. (N. Y.) 26; Bulkley v. Protection Ins. Co., 2 Paine (C. C.), 82; Barnes v. Gonsales, 2 Salk. 445; Holt, 469; Walsh v. Horner, 10 Mo. 6; Vallance v. Dewar, 1 Camp. 503; Folsom v. Merchants' Ins. Co., 38 Me. 414; Arnot v. Innes, 4 Moore, 150; Long v. Russell, 8 Pick. (Mass.) 360; Laroche v. Oswin, 12 East, 131; Ougier v. Jennings, 1 Camp. 505, n.; Union Ins. Co. v. Tyson, 3 Hill (N. Y.), 118; Salvador v. Hopkins, 3 Burr. 1707; Lindsay v. Janson, 4 Hurl. & N. 699; Lockett v. Merchants' Ins. Co., 10 Rob. (La.) 339; Leathley v. Hunter, 10 Barn. & C. 858; 7 Bing. 517; 9 L. J. Exch. 118; 5 Moore & P. 457; Cormack v. Gladstone, 11 East, 347; Kingston v. Knibbs, 1 Camp. 508, n.; Parsons v. Manufacturers' Ins. Co., 16 Gray (Mass.), 463; Stewart v. Bell, 5 Barn. & A. 238.

[169] McCall v. Sun Mut. Ins. Co., 66 N. Y. 505.

[170] Parsons v. Manufacturers' Ins. Co., 16 Gray (82 Mass.), 463.

[171] See secs. 2367, 2368, herein.

[172] Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 384.

§ **2419. Necessity for Repairs.**—In case an insured vessel is so far injured as to render it unsafe, in the judgment of a master of competent skill, prudence, and discretion, to proceed on the voyage without repairs and refitting, he should seek the nearest port practicable therefor; but the master can deviate only so far as is necessary for the required repairs, and if the peril is not imminent, he is not obligated to seek the nearest port out of the course of the voyage. The master must also, in making repairs, content himself with only such repairs as can be most expeditiously made in order that the ship may continue the voyage insured. Thus, if a vessel sustains damages during a gale, she may, if necessary, seek a port of repair out of the course of the voyage insured. If the voyage has been undertaken for any other purpose than repairs, it is a deviation.[173] The master should, however, in determining what port to seek for repairs, consider the extent of the danger, the distance of the port from the course of the voyage, the facilities afforded, and the quickness with which the necessary material can be there procured, and, although there are other nearer ports, the vessel may seek the most proper place for repairs.[174] And if a vessel is driven by stress of weather into a port of distress, or makes a port of necessity, the master is not bound to remain at such port for the needed repairs or refitting, but may in good faith and the exercise of sound judgment, having in view the interests of all concerned, go to a second port more suitable in point of convenience, quickness, and expense, and for refitting; and this rule would also apply in case the necessary repairs cannot be had at the first port.[175] It is held, however, that if a flatboat navigating the Mississippi, after sustaining damage by collision, neglects to

[173] Turner v. Protection Ins. Co., 25 Me. 515; 43 Am. Dec. 294; Aiken v. Mississippi M. Ins. Co., 16 Mart. (La.) 661; Pelly v. Royal Exch. Ins. Co., 1 Burr. 341; O'Reilly v. Gorne, 4 Camp. 249; Motteaux v. London Assur. Co., 1 Atk. 545; Lapham v. Atlas Ins. Co., 24 Pick. (Mass.) 1; 1 Marshall on Insurance, ed. 1810, 207, *209, reporting Lavabree v. Wilson, Doug. 271.

[174] Turner v. Protection Ins. Co., 25 Me. 515; 43 Am. Dec. 294; Morgan v. Oswald, 3 Taunt. 554.

[175] Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73; Hall v. Franklin Ins. Co., 9 Pick. (Mass.) 466.

make necessary repairs through the master's belief that they are not required, or if repairs not being practicable he neglects to transship the cargo, that the underwriters are released.[176] After a departure from the course for repairs the master must pursue the new course without deviation, so as to reach the ship's destination in the shortest and most expeditious manner, unless prevented by necessity, some unforeseen obstacle, or other justifying cause, and any willful departure from the course of the new voyage or unnecessary delay thereon will be a new deviation, releasing the insurer as in the original voyage; although the master is not obligated at all events to enter the new port, as in case the state of the weather renders it dangerous, but he may seek another convenient port without vitiating the insurance.[177] And where a vessel insured to Madeira, and being in sight of it, was prevented by heavy weather from entering, and the master deemed it prudent to run for the Cape de Verde Islands, and might have obtained provisions but not repairs at Mogadore, but might have returned to Madeira, this was held evidence of a deviation without justifying cause.[178] If the accident happens while the property is at the risk of the underwriters, and the ship cannot be repaired at the port of departure, the vessel may go to the nearest port where the damage can be repaired without prejudice to the insurance. The deviation is as excusable as if the accident had happened on the voyage, and the case is the same as if the vessel had been repaired at the port of departure, but the burden of proof is on the assured to show the necessity for such act, and also that the vessel was taken to the nearest port at which repairs could be made. A case of this character is, however, to be distinguished from that where the vessel goes out of her course to supply a defect in the vessel's original seaworthiness.[179] So a vessel is not restricted to going into port once for repairs,

[176] Stewart v. Insurance Co., 1 Humph. (Tenn.) 242.

[177] Turner v. Protection Ins. Co., 25 Me. 515; 43 Am. Dec. 294; 1 Marshall on Marine Insurance, ed. 1810, 205, 209.

[178] Neilson v. Columbian Ins. Co., 1 Johns. (N. Y.) 301.

[179] Cruder v. Philadelphia Ins. Co., 2 Wash. (C. C.) 262, per Washington, J. See Hutton v. American Ins. Co., 7 Hill (N. Y.), 321.

but may go more than once if the necessity warrants.[180] So a vessel insured "at and from" a foreign port may return after sailing for necessary repairs, and sail again, and the insurer be obligated in port also after the vessel's return and on the subsequent voyage.[181] So a vessel insured from a port of lading may return for repairs necessitated by striking the bar when leaving port.[182] And under a like policy a delay for repairs before the vessel is ready to take in cargo is not voluntary, and therefore justifiable.[183]

§ **2420. Stress of Weather—Port of Necessity.**—Stress of weather, or a tempest or peril of the sea, which drives the ship out of her course, or forces her to depart from her route to seek a refuge, is a justifying cause for a deviation. The master may also in good faith and in the exercise of such judgment as is required of a master's skill, prudence, or discretion seek refuge from a tempest or wait for a wind.[184] A lighter insured for a voyage from Norwalk, Connecticut, to Jersey City, is not guilty of a deviation because she makes fast to a Brooklyn dock as a proper precaution to overcome the force of the wind and tide.[185]

§ **2421. Stress of Weather—Vessel Need not Return to Point whence Driven.**—If a vessel is driven out of her course by stress of weather or a peril of the sea into any port, she is only obligated to proceed thence to her port of destination, and need not turn back to the point whence she was driven.[186]

[180] Hall v. Franklin Ins. Co., 9 Pick. (Mass.) 466; Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14.

[181] Taylor v. Lowell, 3 Mass. 331; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56.

[182] Wiggin v. Amory, 13 Mass. 118.

[183] Smith v. Surridge, 4 Esp. 25.

[184] Robson v. Marine Ins. Co., 2 Johns. (N. Y.) 89; Campbell v. Williamson, 2 Bay (S. C.), 237; Delaney v. Stoddard, 1 Term. Rep. 22; Graham v. Commercial Ins. Co., 11 Johns. (N. Y.) 352; 1 Marshall on Insurance, ed. 1810, 206.

[185] New Jersey Lighterage Co. v. New York Mut. Ins. Co., 49 N. Y. S. C. 165.

[186] Delaney v. Stoddard, 1 Term. Rep. 22, per Lord Mansfield, reported in 1 Marshall on Insurance, ed. 1810, 206, et seq.

§ 2422. Compulsory Delay or Deviation by Superior Authority.—If a vessel is compelled to anchor, in a port not described in the policy, by the military power of belligerent, it is no deviation,[187] for a delay may be justified when necessitated by physical as well as moral force, which the master could not, or ought not, to resist. But a vessel is not justified in departing from her course in obedience to orders of a ship of war, no force, threats, or remonstrance being used, and no force being exercised which the master as a good subject ought not to have resisted.[188] And a vessel insured to an island and market, and having arrived at the island and discharged a part of her cargo, and taken on ballast necessary to her safety, and while proceeding on her voyage is compelled by the government to put into a port at which there is no market for her cargo, there is no deviation which releases the insurers.[189] And where a neutral ship was carried by a British cruiser out of her course, but she was afterward released and proceeded on her voyage, it was held not a voluntary act, and therefore no deviation, although the vessel was insured against sea and fire risks only.[190]

§ 2423. Turned Away—Blockade.—If a vessel is insured against sea risks only, and is turned away from her port by a ship of war because of a blockade, and departs by reason thereof, and is driven by stress of weather into another port, this is a justifiable deviation.[191] But where a ship is turned away from her port of destination because it is in the enemy's hands, and is unable to unload any part of her cargo or make necessary repairs, and makes for a port of safety, it is held that there is such a deviation as to discharge the insurers from the moment she is so turned away.[192] This question will, however, be more fully considered elsewhere.[193]

[187] Savage v. Pleasance, 5 Binn. (Pa.) 403; 6 Am. Dec. 424.

[188] Phelps v. Auldjo, 2 Camp. 350, per Lord Ellenborough. See, also, Burgess v. Equitable Ins. Co., 126 Mass. 70, per Endicott, J.

[189] Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303.

[190] Scott v. Thompson, 4 Bos. & P. 181; 1 Bos. & P. N. R. 181.

[191] Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 89. See sec. 2741, herein.

[192] Parkin v. Tunno, 2 Camp. 59; 11 East, 22.

[193] See c. lviii, herein, as to capture, arrest, restraint, detention, etc.

§ **2424. Compulsory Delay or Deviation by Acts of Crew.**—If the master is compelled by force to depart from the course of the voyage, or delay the same by acts of his crew, it is an excusable deviation, and it makes no difference whether the master be constrained to deviate by actual physical force on the part of the crew or by their refusal to otherwise navigate the ship. It is sufficient that the acts of the crew create a necessity which leaves the master, in the exercise of a sound judgment and discretion, no alternative but to deviate.[194]

§ **2425. Departure from Route or Delay to Save Life or Property.**—A vessel may depart from her course or may delay to save life and succor mariners or passengers destitute or suffering on board distressed vessels, in danger of shipwreck or foundering, but a departure from the course or delay for the purpose of saving property alone is not justifiable. If there is a double motive to save life or relieve distress, and also to save property, there is no deviation, and if the master sees another vessel in apparent distress, he is clearly justified in departing from the course of the voyage or in delaying to ascertain if there are lives to be saved or distress to be relieved. In all such cases the master will have the benefit of any doubt, and a favorable construction be given his motives; for the duty of succoring distressed vessels is imposed by every dictate, not only of policy, but of humanity upon every man who has it in his power to render such aid or relief.[195]

[194] Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J.; Elton v. Brogden, 2 Strange, 1264, per Lee, C. J.; Driscoll v. Bovil, 1 Bos. & P. 313; Driscoll v. Passmore, 1 Bos. & P. 313. See Brazier v. Clapp, 5 Mass. 1.

[195] Crocker v. Johnson, 1 Sprague (C. C.), 141; Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J.; The Schooner Boston, 1 Sum. (C. C.) 328, per Story, J.; Lawrence v. Sidebotham, 6 East, 54, per Lawrence, J.; Bond v. The Brig Cora, 2 Wash. (C. C.) 80; The Henry Ewbank, 1 Sum. (C. C.) 400; The Beaver, 3 Rob. Adm. 292, per Lord Stowell; Settle v. St. Louis etc. Ins. Co., 7 Mo. 379; Company of African Merchants v. Foreign M. Ins. Co., 8 L. R. Ex. 154; 42 L. J. Ex. 60; Mason v. Ship Blaireau, 2 Cranch (U. S.), per Marshall, J.; Herman v. West etc. Ins. Co., 15 Curry, (La.), 517; Walsh v. Horner, 10 Mo. 6; Crocker v. Jackson, Sprague (C. C.), 141; Perkins v. Augusta etc. Banking Co., 10 Gray (Mass.), 312; A Box of Bullion, 1 Sprague (C. C.), 57.

It is not a deviation for a vessel to go out of her course three miles to speak another at sea, on seeing a signal for that purpose, nor to delay three hours to take from a foreign ship, bound to a foreign port shipwrecked mariners of the United States, for the purpose of bringing them direct to the United States.[196] It is also held no deviation in the navigation of the Mississippi for one vessel to stop and assist another in distress, even though no lives are in danger.[197] In a federal case under a charter party, it was, however, held an unjustifiable deviation where the vessel proceeded forty miles out of her course to take in tow a disabled vessel, and she was detained seven days, although under the bill of lading the vessel had liberty to call at any ports for any purpose whatsoever, and "to tow and assist vessels in all situations." But this clause was held to refer to ports along the course of the specified route, and the charter gave no such liberty. In this case the vessel was held liable to the charterer for increased premiums and insurance, and for interest on the goods during the delay.[198] The rule as to saving life is not confined to mariners or passengers so distressed or suffering on board other vessels, but a departure or delay is justifiable to relieve urgent distress, or administer to those on board taken from distressed vessels and suffering from disasters of shipwreck, and also of all other distressed and suffering persons lawfully on board. But in all cases where this last rule is sought to be applied, in determining whether the deviation is justifiable, the extent, degree, and urgency of the sufficiency which demands the relief, and the adequacy of the present means available should be carefully weighed, as well as the nearness to port, the increased length of the voyage, the delay necessitated, and the danger to the other lives on board, and whether a justifying necessity exists must be one of fact. The following case, however, commends itself, in holding that the vessel was justified in delaying eleven days for necessary medical attendance to the captain's wife, who, being in the third month of her pregnancy, had fallen

[196] A Box of Bullion, 1 Sprague (C. C.), 57.
[197] Walsh v. Homer, 10 Mo. 6; 45 Am. Dec. 342.
[198] Ardan S. S. Co. v. Thebaud, 35 Fed. Rep. 620.

six feet when about to go down into the cabin. The ship was passing Gibraltar at the time, and she had gone on deck to look at the rocks, and had turned suddenly and missed her footing, and was seriously injured.[199] But a delay of three weeks of a chartered vessel in a port of necessity is not justified by an attack of acute rheumatism of the master, and in such case the charterer is entitled to indemnity for the detention.[200] An imminent peril to life and property outweighs all other considerations, and requires the master to instantly depart from the voyage insured and seek the nearest land, nor should the insurer's interest control the master in deciding upon such a deviation.[201]

§ **2426. Delay at Port or Place or in Prosecuting Voyage.**—As we have seen, not only must reference be had to the terms of the policy as to the route or voyage permitted, but also to the character of the voyage and the purposes thereof, and as the risk may be varied by a departure from the route, so also may it be changed by delay in commencing or prosecuting the voyage insured. It is a general rule that an insured ship must proceed on her voyage with reasonable expedition, and without unnecessary delay.[202] The delay may also occur in port after the commencement of the risk, as well as in prosecuting the voyage,[203] and evidence of an unreasonable delay in prosecuting the voyage is admissible.[204] Where the delay is relied on as a deviation, it is a question for the jury whether it was justified in the exercise of sound discretion and good faith, by necessity, or reasonable cause.[205] If

[199] Perkins v. Augusta Ins. etc. Co., 10 Gray (Mass.), 312; 71 Am. Dec. 654.

[200] The Giulio, 34 Fed. Rep. 709 (a noteworthy case).

[201] Turner v. Protection Ins. Co., 25 Me. 515; 43 Am. Dec. 294.

[202] Himely v. South Carolina Ins. Co., 1 Mills (S. C.), 153; 12 Am. Dec. 623.

[203] Taylor v. Lowell, 3 Mass. 331; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 357, *351; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 459.

[204] Arnswick v. American Ins. Co., 129 Mass. 185.

[205] Foster v. Jackson etc. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290.

the delay in commencing or prosecuting the voyage is reasonable and necessary for the purposes of the voyage, or is excused by other justifying cause, there is no deviation.[206] And a deviation may arise from unjustifiable delay at the end of the voyage, although awaiting her turn to be admitted to a dock to unload is not a deviation by the vessel;[207] but if there exists no such justifying excuse for delaying the commencement or prosecution of the voyage insured, or if the vessel delays in port for the prosecution of business not connected with the purposes of the voyage, the underwriter is discharged.[208] If the vessel delays the commencement of the risk by undertaking an intermediate voyage, this is a deviation.[209] What constitutes a reasonable and justifiable cause for delay in commencing or prosecuting the voyage is dependent upon varying conditions, such as the character of the voyage, the business or trade in which the ship is engaged, the description of the risk, or terms of the policy. The vessel may, undoubtedly, be detained for a reasonable time for the purposes of the adventure, but such fact cannot be determined by any positive rule; every case must depend upon its entire circumstances.[210] The extent of the stay in port may vary, but mere length of time is not controlling,[211] and a delay which would not be justifiable in one case may be excusable in another. Thus, where a vessel stayed in port six months after the date of the policy, it was held not to be a deviation, it not being fraudulent or varying the risk.[212] So delays have been held justi-

[206] Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 283, per Story, J.; Phillips v. Irving, 7 Man. & G. 325; Burgess v. Equitable Ins. Co., 126 Mass. 70, per Endicott, J.

[207] Samuels v. Royal Ex. Assur. Co., 8 Barn. & C. 119.

[208] Earl v. Shaw, 1 Johns. Cas. (N. Y.) 313; African Merchants v. British Ins. Co., L. R. 8 Ex. 154; Seamans v. Loring, 1 Mason (C. C.), 127; Burgess v. Equitable M. Ins. Co., 126 Mass. 70, per Endicott, J.; Mount v. Larkins, 8 Bing. 122, per Tindal, C. J. See sec. 2380, herein.

[209] Vallance v. Dewar, 1 Camp. 503. See sec. 2380, herein.

[210] See Phillips v. Irving, 7 Man. & G. 325; 13 L. J. Com. P. 145; Motteaux v. London Assur. Co., 1 Atk. 545; Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 283, Story, J.

[211] Grant v. Keene, 4 Esp. 175, per Lord Ellenborough.

[212] Earl v. Shaw, 1 Johns. (N. Y.) 314; 1 Am. Dec. 117.

fiable when existing for seventy-two days,[213] for one hundred and nine days,[214] for over four months,[215] for two months,[216] and for nine months for needed repairs and to obtain a cargo.[217] So a delay for over a month after the cargo was loaded, caused by inability to obtain a crew, is excusable, but is not justified by proceedings in admiralty for the recovery of debts,[218] and, after obtaining a manifesto and customhouse clearances, a delay long enough to put goods of the insured on board by a packer was excusable.[219] But the insurers will be released by a delay of eight days to obtain a supercargo,[220] or of twenty-four hours to transfer goods without necessity.[221] So also of a delay to save cargo of a sunken ship.[222] There is in policies "at and from" an implied agreement that the risk shall commence in a reasonable time, in the absence of an express provision to the contrary.[223] The vessel under such a policy may not, therefore, delay an unreasonable time after she is "at" and before commencing a voyage; she may delay a reasonable time for justifiable cause.[224] A delay of four months where the policy attaches at the port of lading,[225] or of twenty-four months not accounted for, releases the underwriters.[226] So under a policy "at and from, and until moored twenty-four hours in safety," an unnecessary stay for a month discharges the underwriters.[227] And the ship may not delay

[213] Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 283.

[214] Baine v. Case, 3 Car. & P. 496.

[215] Gilfert v. Hallett, 2 Johns. (N. Y.) 297.

[216] Langhorne v. Allnutt, 4 Taunt. 511.

[217] Phillips v. Irving, 13 L. J. Com. P. 145; 7 Man. & G. 325.

[218] Augusta Ins. Co. v. Abbott, 12 Md. 348.

[219] Carruthers v. Gray, 15 East, 35; 3 Camp. 142.

[220] Martin v. Delaware Ins. Co., 2 Wash. (C. C.) 254.

[221] Settle v. St. Louis Perpet. Ins. Co., 7 Mo. 379.

[222] Company of African Merchants v. British etc. M. Ins. Co., 8 L. R. Ex. 154; 42 L. J. Ex. 60.

[223] De Wolff v. Archangel Maritime B. etc. Co., 9 L. R. Q. B. 451; 43 L. J. Q. B. 147.

[224] Chitty v. Selwyn, 2 Atk. 359; Augusta etc. Ins. Co. v. Abbott, 12 Md. 348; Motteaux v. London Assur. Co., 1 Atk. 545, per Lord Hardwick; Seamans v. Loring, 1 Mason (C. C.), 127.

[225] Palmer v. Fleming, 9 Bing. 460; 2 Moore & S. 624.

[226] Palmer v. Marshall, 8 Bing. 79, 317.

[227] Lee v. Mather, 1 Esp. 412.

unnecessarily before arriving at the outport under a policy "at and from" homeward;[228] nor may the master detain the vessel for his own purposes before arriving "at" the outport under such a policy.[229] A vessel insured from a port with liberty to trade is not justified in staying seven months beyond the usual time of vessels engaged in such trade.[230] When staying for the purposes of trade having no reference to the main scope of the voyage insured, it is a deviation, even though there is a liberty of ports for any purpose whatsoever.[231] If the delay is incurred bona fide in the course of trade, and to accomplish the objects of the adventure, it is excusable;[232] as in case of a "seeking ship" waiting for a remunerative cargo, owing to the large number of vessels in port, the scarcity of produce, the depressed state of trade, and extremely low rates of freight.[233] If, on being refused an entrance at the place of destination, a master delays under a reasonable expectation of finally being able to obtain it, it will not be a deviation.[234] So the ship may be justified in waiting bona fide at the port that she has entered for the purpose of disposing of her cargo at a price limited by the owner, which is reasonable. The master is not compelled to sacrifice his cargo so soon as he arrives in port by selling it at whatever price he can obtain, but he ought not fairly to be permitted to wait beyond such time as it is clearly evident that there will be no change in the market.[235] So delay on an intermediate voyage may be justified by the usages of a particular trade,[236] and where a vessel is driven into a port

[228] Mount v. Larkins, 8 Bing. 108; 1 L. J. Com. P., N. S., 20; Freeman v. Taylor, 8 Bing. 124.

[229] Mount v. Larkins, 8 Bing. 108; 1 L. J. Com. P., N. S., 20.

[230] Hartley v. Buggin, 3 Doug. 39. See Lavabre v. Wilson, 1 Doug. 284; Hamilton v. Shedden, 3 Mees. & W. 49.

[231] Williams v. Shee, 3 Camp. 469.

[232] Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 283, per Story, J.

[233] Phillips v. Irving, 7 Man. & G. 325; 13 L. J. Com. P. 145.

[234] Suydam v. Marine Ins. Co., 2 Johns. (N. Y.) 138.

[235] Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 283, per Story, J.; D'Ellerry v. New England Ins. Co., 8 Pick. (Mass.) 14.

[236] Vallance v. Dewar, 1 Camp. 503; Kingston v. Knibbs, 1 Camp. 508.

of necessity, and a pestilence breaks out, which prevents her pursuing her voyage, it is a loss within the meaning of the policy,[237] and a delay may be justified under a liberty in the policy,[238] but the vessel must not delay beyond the time permitted.[239]

§ **2427. Delay for Towing Vessel.**—A delay for the purpose of towing not permitted by the terms of the policy, or within the purposes and scope of the voyage insured, is such a change of risk as releases the insurers. Thus, taking a brig in tow by a steamer is a deviation by the latter, there being nothing in the policy which expressly authorized it. Especially where the steamer is, by reason of said tow, compelled to stop because stress of weather prevents making headway with the brig.[240] In a New York case the facts were as follows: On June 13, 1879, the company insured a steam tug, then lying at St. Georges in the Bermudas, "at and from Bermuda to New York," to sail during July. On July 2d she left her berth and steamed to Hamilton, about twenty miles, where she took a schooner in tow and brought it to St. Georges, and from there towed it out to sea, about five miles, and then returned to her berth. On July 3d, after receiving her clearance papers, she towed another schooner to sea, then proceeded to Hamilton and took on coal and a lifeboat, and sailed from there July 4th for New York, and was lost en route. It was held that the towing trips were such deviations as forfeited the insurance.[241]

§ **2428. Vessel Turned Away, and Delay in Port which she has Entered.**—A vessel which has been turned

[237] Williams v. Smith, 2 Caines (N. Y.), 1.

[238] Doyle v. Powell, 4 Barn. & A. 267; Hughes v. Union Ins. Co., 3 Wheat. (U. S.) 159; Langhorne v. Allnutt, 4 Taunt. 511. And see cases under sections in this chapter covering "liberty of ports."

[239] Doyle v. Powell, 4 Barn. & A. 267.

[240] Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340; 41 Am. Dec. 592.

[241] Schneider v. Atlantic Mut. Ins. Co., 95 N. Y. 196; 47 Am. Rep. 29. See, also, Herman v. Western M. & F. Ins. Co., 13 La. (O. S.) 516; Gourock Rope Works Co. v. Fleming, 5 C. C. S., 3d ser., 501. See sec. 2398, herein.

away by a ship of war and has entered a port which under the terms of the policy she may enter, in such case is justified in delaying in said port a reasonable time to avoid heavy weather and to secure the protection of a convoy to avoid seizure.[242]

§ **2429. Departure from Route or Delay to Avoid Danger, Cruisers, or Capture.**—If the danger of capture is real and imminent, or there is a reasonable and just ground, in the judgment and discretion of the owners or the master acting in good faith for the belief that it is so, a vessel is justified, in order to avoid enemy's cruisers, in delaying in port, or in going out of her usual course, or in putting into port to seek convoy, or in hastily departing from a port before she is fully equipped and prepared for her voyage.[243] And a vessel pursued by a cruiser may seek an intermediate port to avoid the danger of capture.[244] So putting into a port, while obliged to wait for a favorable wind in order to avoid such danger is justifiable.[245] So a vessel may put into port to obtain the protection of convoy, the danger of capture being imminent.[246] And a vessel with leave to stop at a port to learn if any men-of-war are off a certain port is justified in putting into said port to avoid cruisers, and in delaying there so long as the danger from the cruisers off such port may continue,[247]

[242] Snowden v. Phœnix Ins. Co., 3 Binn. (Pa.) 457. The ship in this case awaited convoy to avoid seizure under Bonaparte's Milan decree, which was a violation of the law of nations, and the vessel delayed four months.

[243] Goyon v. Pleasants, 3 Wash. (C. C.) 241; Post v. Phœnix Ins. Co., 10 Johns. (N. Y.) 138; Driscoll v. Bovil, 1 Bos. & P. N. R. 200; Oliver v. Maryland Ins. Co., 7 Cranch. (U. S.) 493; Whitney v. Haven, 13 Mass. 172; Patrick v. Ludlow, 3 Johns. (N. Y.) 10; 2 Am. Dec. 130; Wiggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; Blankenhagen v. London Assur. Co., 1 Camp. 453; Suydam v. Marine Ins. Co., 2 Johns. (N. Y.) 138; Reade v. Commercial Ins. Co., 3 Johns. (N. Y.) 453; 3 Am. Dec. 495; O'Reilly v. Gonne, 4 Camp. 249.

[244] Post v. Phœnix Ins. Co., 10 Johns. (N. Y.) 79.

[245] Suydam v. Marine Ins. Co., 138; Post v. Phœnix Ins. Co., 10 Johns. (N. Y.) 79.

[246] Patrick v. Ludlow, 3 Johns. (N. Y.) 10; 2 Am. Dec. 130.

[247] Hughes v. Union Ins. Co., 3 Wheat. (U. S.) 159. See, also, as to extent of delay, Post v. Phœnix Ins. Co., 10 Johns. (N. Y.) 80.

but the vessel should not remain longer than necessary.[248] So if there is imminent danger of capture, the vessel may delay sailing, and it is not a deviation if done to avoid a peril insured against.[249] The general principles governing the class of cases considered under this section are as follows: While the underwriters are presumed tacitly to assent to all reasonable efforts on the master's part for the safety of the property insured, and to authorize the usual means of avoiding urgent danger,[250] yet an increase of risk after the voyage is begun will not excuse the insured beyond a prudent and necessary deviation in order to avoid it.[251] And the danger which will justify a vessel in remaining in port a long time must be obvious, immediate, and directly applied to the interruption of the voyage, and imminent, not distant and contingent and indefinite.[252] A mere apprehension of danger, unless founded upon reasonable evidence, does not justify deviation. The peril apprehended must be one that would occasion serious loss or injury; it must be imminent and obvious, not problematical or contingent. If the apprehended danger be such as would justify a departure, the master should, if possible, go to the nearest practicable port in the course of the voyage, and the deviation is not justified where the vessel seeks a port many hundred miles out of the course.[253]

§ **2430. Vessel Delayed by Ice.**—If a vessel finds it impossible to reach her port of destination by reason of ice closing navigation, she is justified in a reasonable delay, and also in attempting to seek the nearest practicable port in prosecuting her voyage, where the master exercises good faith.

[248] Goyon v. Pleasants, 3 Wash. (C. C.) 241.

[249] Whitney v. Haven, 13 Mass. 172. See Duerhagen v. United States Ins. Co., 2 Serg. & R. (Pa.) 309; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; 16 Am. Dec. 302; Neilson v. Columbian Ins. Co., 1 Johns. (N. Y.) 301.

[250] Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; 16 Am. Dec. 302.

[251] King v. Delaware Ins. Co., 2 Wash. (C. C.) 300.

[252] Oliver v. Maryland Ins. Co., 7 Cranch (C. C.), 487.

[253] Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; 16 Am. Dec., 302. See Blankenhagen v. London Assur. Co., 1 Camp. 454.

Thus, where an insurance was on cargo at and from Carlsham to St. Petersburg, and the vessel sailed, but by reason of adverse winds attempted to get into Revel, but being unable to make that port put into port Baltic, where, being informed that it would be impossible to reach Cronstadt by reason of the ice, she remained about twenty days, when wind and weather appearing favorable she sailed for Revel, but heavy and thick weather and adverse winds coming on she was lost on a shoal while trying to get into Revel, it was held that going to port Baltic and delaying there, and subsequently attempting to make Revel, were justifiable, and not a deviation.[254]

§ **2431. Deviation to Comply with Warranty.**—A deviation is justifiable when necessary to comply with a warranty; as in case of a warranty to depart with convoy. The rule is especially applicable where the departure from the course is in conformity with usage. But if the departure from the route be for another distinct purpose, and not for the purpose of compliance with the warranty, it is not excusable.[255] If, however, a convoy might be obtained at a nearer port than that to which the instructions are to proceed for convoy, conforming to instructions may amount to a deviation.[256]

§ **2432. Departure from Course or Delay to Seek Protection of Convoy.**—If the stipulations of the contract require the master to join convoy, or if the master, acting bona fide and with the sole view of avoiding danger and to seek the safest course to his destination, departs from the route or delays for the purpose of seeking protection of con-

[254] Graham v. Commercial Ins. Co., 11 Johns. (N. Y.) 352. See Blankenhagen v. London Assur. Co., 1 Camp. 443, per Lord Ellenborough.

[255] Bond v. Nutt, Cowp. 601, reported in 1 Marshall on Insurance, ed. 1810, *354, per Lord Mansfield; Gordon v. Morley, 2 Strange, 65. "A deviation is proper . . . . when necessary to comply with a warranty": Deering's Annot. Civ. Code Cal., sec. 2695, subd. 2 See text section, herein.

[256] Hazelton v. Allnutt, 1 Maule & S. 45.

voy, this is a justifiable deviation,[257] and this is so even though the vessel is forced by stress of weather to prosecute or continue her voyage without convoy.[258]

§ **2433. Right to Convoy Prize under Liberty Clauses to Cruise, Capture, etc.**—The liberty to "cruise or capture" or "cruise, capture, and man prizes," and the like, does not permit a vessel to delay or depart from the course of her voyage to convoy her prize and thereby correspondingly change the risk, but if there is no delay or departure from the route in convoying the prize whereby the route is changed, such act is not a deviation, nor is it a deviation to convoy if there be a liberty so to do; and if a liberty to cruise and capture, or the like, be given, but it is confined in its exercise within certain specified limits, such clause controls.[259] Within this rule sailing as convoy for ten days was held no deviation.[260] But where the master convoyed his prize, and several times during the voyage shortened sail and lay to in order to give time to the prize to come up, and particularly on one occasion, when the prize carried away her foretopmast, it was held a deviation, and that the liberty did not extend to convoying prize, even though the port to which she was being convoyed was within the limits of the voyage.[261] And if the liberty be ex-

[257] D'Aguilar v. Tobin, Holt N. P. 185; Bond v. Gonsales, 2 Salk. 445; Bond v. Nutt, Cowp. 601, per Lord Ellenborough, reported in 1 Marshall on Insurance, ed. 1810, *355; Snowden v. Phœnix Ins. Co., 3 Binn. (Pa.) 437; 1 Marshall on Insurance, ed. 1810, *210; Governeur v. United States Ins. Co., 1 Caines (N. Y.), 592; Patrick v. Ludlow, 3 Johns. (N. Y.) 10; 2 Am. Dec. 30.

[258] Patrick v. Ludlow, 3 Johns. (N. Y.) 10; 2 Am. Dec. 30; Lane v. Glover, 5 Taunt. 89.

[259] Ward v. Wood, 13 Mass. 539 (liberty "to cruise and capture"); Lawrence v. Sidebotham, 6 East, 45, reported in 1 Marshall on Insurance, ed. 1810, 199 ("with leave to chase, capture, and man prizes"); Hibbert v. Halliday, 2 Taunt. 428 ("to chase, capture, and man any prize or prizes . . . . to cruise anywhere and in any latitude on the outward bound voyage on this side of Cape Horn"); Jarratt v. Ward; 1 Camp. 263 ("to cruise for, chase, capture, man and see into port any ship or ships of the enemies").

[260] Ward v. Wood, 13 Mass. 539.

[261] Lawrence v. Sidebotham, 6 East. 45, reported in 1 Marshall on Insurance, ed. 1810, *199.

tensive enough to warrant convoying the vessel into port, such provision will not authorize a delay there beyond what the permission necessarily and reasonably implies.[262]

§ **2434. Deviation to Recapture Vessel.**—Where the master of a vessel departs from the course of the insured voyage in pursuit of a vessel which has been piratically taken off by its crew, it is a deviation, unless the act of the master is such as to constitute barratry.[263]

§ **2435. Letter of Marque—Cruising and Making Prizes.** A merchant ship carrying letters of marque and insured as such has no right to cruise at large in quest of prizes; that is, she must not delay the prosecution of her voyage to lie in wait for prizes, or depart from her course to seek them. But if hostile vessels come in sight within the course of her voyage, she may chase and capture them, or lie in wait for them, without its being such a deviation as will release the insurer; although such acts of delay or departure must be fairly attributable to motives for self-defense, or to intimidate the enemy and repel a meditated attack before she herself should be disabled. If said acts are, however, based upon motives of profit, for the mere purpose of making a prize, they are not justifiable. The right to capture, if justifiable, draws to it all the incidents necessary to make it effectual, and, therefore, justifies a delay for the purpose of manning a prize. If it is made known to the underwriters at the time of insuring that the ship carries letters of marque, it makes no difference that the vessel is not described as such in the policy.[264] Such, at least, seems to be the law in this country, and it evidently conforms with that existing under the English cases.[265] Although in a Massa-

[262] Jarratt v. Ward, 1 Camp. 263 (delay for repairs not justified).

[263] Hood v. Nesbitt, 2 Dall. (Pa.) 137; 1 Yeates (Pa.), 114; 1 Am. Dec. 265; Robinson v. Jones, 8 Mass. 536. See sec. 2415, herein.

[264] Haven v. Holland, 2 Mason (C. C.), 230, per Story, J.

[265] Wiggin v. Boardman, 14 Mass. 12; Wiggin v. Amory, 14 Mass. 1; 13 Mass. 123; Hibbert v. Halliday, 2 Taunt. 428; 1 Marshall on Insurance, *195, et seq., citing Cock v. Townson, Beav. 316; Park on Insurance, 396, per Lord Camden, C. J., and reporting Jolly v. Walker, Beav. 316; Park on Insurance, 396, where the case was

chusetts case, where the ship carried letters of marque obtained from the American minister for her homeward voyage, with the understanding that they were to be used only for purposes of dispatch, and her armament was increased from four to fourteen guns, and the crew from thirty to seventy men, about three days out from France on her voyage, a brig was seen standing for the insured vessel, she was captured, and a delay of about two hours was made to man the vessel, she was sent into a port in France and condemned, and this was held a deviation.[266] But it was also held that a letter of marque does not confine the vessel to acts merely of defense, but extends the right to pursue hostile ships in sight.[267] So it is decided that the ship may attack and capture a vessel which comes across her course where there is no departure from the voyage, although there are other motives than those merely of self-defense.[268]

left by Lord Mansfield to the jury, and it was admitted that the vessel could not cruise, yet if an enemy came in her way she might engage or defend herself. The vessel was insured "at and from London to Cork and the West Indies," and had letters of marque on board. And Parr v. Anderson, 6 East, 202, where the vessel was insured "with or without letters of marque," and she altered her course a quarter of a point, pursued a hostile vessel in sight for about a quarter of an hour, when she abandoned the chase and proceeded on her voyage. Lord Ellenborough left it to the jury to determine whether the deviation was for the mere purpose of capture or for defense, and if the latter, they should find for the plaintiff. The jury found for defendant, and a new trial was granted, and the case sent back to the jury to ascertain if any usage of trade existed, and what it was. It was also said in this case that the purposes of defense might happen in various ways, "as by making a show of confidence in the face of an enemy with a view to deter them from an attack, or, if that could not be accomplished, with a view to obtain some advantage in the conflict, and the like": 1 Arnould on Marine Insurance, Perkins' ed. 1850, 395-402, *391-398; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 493-99; 2 Parsons on Marine Insurance, ed. 1868, 22, 36, et seq., and notes; 1 Phillips on Insurance, 3d ed., 581-84, sec. 1029; 3 Kent's Commentaries, 5th ed., 316.

[266] Wiggin v. Amory, 14 Mass. 1; 13 Mass. 123.

[267] Hove v. Mason, 1 Wash. (Va.) 207. See, also, Wiggin v. Boardman, 14 Mass. 12.

[268] Jolly v. Walker, Beav. 316, reported in 1 Marshall on Insurance, ed. 1810, *196; Park on Insurance, 396.

§ **2436. Instructions as to Cruising.**—If the acts of cruising, chasing, or convoying prize are not justified by the liberty given under the policy, they are none the less a deviation because done in pursuance of her instructions,[269] although it may be a question whether the act of cruising contrary to instructions is a mere deviation or barratry. If the act be based on fraud or criminality of the master to the prejudice of the owners, it would probably be barratrous.[270] A warranty that "orders will be given that the ship shall not cruise" is not complied with unless such orders are expressly given to the captain. No compliance can arise by implication from the implied instructions, and there being no proof of express directions not to cruise, the insurers would be released.[271]

§ **2437. Understood Purpose for which Letters of Marque Taken is Important.**—The understood purpose for which letters of marque are taken ought to be an important factor in determining what their use shall be; as where they were taken for the sole purpose of inducing seamen to ship, and without any intention of cruising,[272] or where they were taken with the intention of being used for defense only.[273]

§ **2438. Liberty Clauses to Cruise, Capture, etc.—Construction.**—If the policy gives a liberty "to cruise and capture," or "to chase, capture, and man prizes," or a like liberty, but confines the exercise thereof within certain specified limits, or if there be any other similar stipulation, such liberty must no doubt be confined in its exercise within the strict meaning of the terms used, and the permission cannot be extended beyond what is necessary for the performance of the permitted acts, although such a liberty ought also to carry

[269] Lawrence v. Sidebotham, 6 East, 45.

[270] Moss v. Byron, 6 Term. Rep. 379, as construed in Wiggin v. Amory, 14 Mass. 1. See Wiggin v. Boardman, 14 Mass. 12; Phyn v. Royal Exch. Assur. Co., 7 Term. Rep. 505.

[271] Ogden v. Ash, 1 Dall. (C. C.) 162.

[272] Moss v. Byron, 6 Term. Rep. 379.

[273] Wiggin v. Amory, 14 Mass. 1; 13 Mass. 123; Haven v. Holland, 2 Mason (C. C.), 230; Parr v. Anderson, 6 East. 202 (contention of defendants).

with its lawful and justifiable exercise all the incidents necessary to make the capture effectual, but nevertheless throughout the entire class of cases of this character, as well as in all those wherever the right of making and securing prize is claimed, the determining factor or test is whether there has been a change of risk. A proven usage may, however, justify an act which would otherwise, under this class of policies, be a deviation.[274]

§ **2439. Carrying Letters of Marque no Deviation in Itself.**—The mere fact of carrying letters of marque is in itself no deviation.[275]

§ **2440. Liberty Clauses to Cruise, Capture, etc., for Designated Time.**—If the time during which the vessel has liberty to cruise is designated by weeks, days, etc., it means successive weeks, days, etc., from the commencement of the cruise, when no time of commencement is specified, and cruising at different times not within such period is a deviation, unless a usage exists justifying such desultory cruising.[276]

§ **2441. Whether the Peril which will Justify a Deviation must be One Insured against.**—The question whether a vessel is justified in a delay or a departure from her course to avoid a peril not insured against has been much discussed.[277] It would seem, in view of the cases and of the

[274] See Lawrence v. Sidebotham, 6 East, 45, per Lord Ellenborough, and cases generally under secs. 2433-39, herein.

[275] Jarratt v. Walker, 1 Camp. 277; Haven v. Holland, 2 Mass. 230; Raine v. Bell, 9 East, 195, per Lawrence, J.; Wiggin v. Amory, 13 Mass. 118; Wiggin v. Boardman, 14 Mass. 12. Formerly otherwise, Dennison v. Modigliani, 5 Term. Rep. 580.

[276] Syers v. Bridge, Doug. 509, reported in 1 Marshall on Insurance, ed. 1810, *197, et seq., per Lord Mansfield.

[277] Mr. Arnould distinguishes between a deviation necessitated by the immediate and irresistible operation of a peril not insured against or excluded, and a going off the course in order to avoid such peril, or to repair in consequence thereof. Mr. Maclachlan, in his recent edition of Mr. Arnould's work, does not, however, make this distinction, although he goes to the extent of stating that the

opinions of text-writers,[278] that the weight of authority at the present day does not rest the question of deviation upon the

deviation is justified when the "necessary effect of the immediate and inevitable operation of a peril not insured against" or excluded: 1 Arnould on Marine Insurance, Perkins' ed. 1850, 411-13, *406-8; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 508. In one of the cases, however, relied on by Mr. Arnould, the insurance was against sea risk and fire only, and the vessel was seized, carried off her course, and detained by a British cruiser, and the court said that a deviation never puts an end to the insurance unless it be a voluntary act of those who have the management of the ship. "Here the deviation was occasioned by force, which in such case is necessity; and there is no ground for the distinction between a policy confined to sea risk and fire, and a general policy including all risks:" Scott v. Thompson, 1 Bos. & P. N. R. 181, per Sir James Mansfield, C. J. Clearly, in this case the sole distinction was whether the act was voluntary or one justified by necessity, without regard to the fact whether the peril was one insured against or not. In another case relied on by Mr. Arnould capture or seizure was an excepted peril, and the vessel endeavored to avoid this peril by cutting her cables and putting to sea when she had half completed her loading, and, subsequently sustaining damage, put into a port for repairs. This was held a deviation, because the ship endeavored to avoid a risk against which the underwriters had stipulated. While in another case, under the same facts, the deviation was covered by a peril insured against: O'Reilly v. Royal Exch. Ins. Co., 4 Camp. 246, per Gibbs, C. J.; O'Reilly v. Greene, 4 Camp. 249. Mr. Maclachlan, however, omits any reference to either case in this connection, but does notice elsewhere and remarks under a subsequent chapter, as to the first case, that "when she (the vessel) was lost, she was out of her due course, carried thither seemingly because she left port in a state of unseaworthiness": 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 842. Mr. Phillips criticises at length this distinction of Mr. Arnould's, and says no such distinction was made in the authority relied on, and that the rulings in the two cases referred to were based upon the fact that the risk was excepted in one case and not in the other, and that, even in this view, the ground is not tenable: 1 Phillips on Insurance, 3d ed., 597, sec. 1025. He also speaks of the case as "a hasty ruling at nisi prius." In a case in this country it is declared that the mere apprehension of danger is not of itself sufficient to justify a deviation without other reasonable ground, but that if the danger be urgent, or the peril which it is sought to avoid be such that it would necessarily occasion serious injury or loss if met, or there is a reasonable ground for a belief that it would have such effect, the master is justified in a delay or a departure from the voyage insured to save either ship or cargo, whether the peril be one insured against or

[278] See last note.

fact whether the peril is one insured against or not, but that if the deviation is not voluntary, and one which would be justifiable if the insurance were against perils of the sea generally, it makes no difference whether the peril justifiably necessitating the deviation is one insured against or not.[279]

§ 2442. Loss Need not be Connected with Deviation. The insurers are released from the time of a deviation without a justifying cause occurs.[280] It is not, therefore, necessary to show that a subsequent loss arose from or was connected with the deviation.[281]

§ 2443. Whether any Exception Exists to Last Rule. As already noted, however, there is a class of cases where the policy is on time with clauses limiting the navigation, and in

not: Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279. And where a vessel insured against a sea risk only is turned away by a blockading squadron, and thereafter suffered loss, this was held no deviation: Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 89.

[279] "Going off the course or delay from necessity, or any other cause which would be justifiable under a policy against perils of the sea generally, is not a deviation under one against one or a part only of such perils": 1 Phillips on Insurance, 3d ed., 578, sec. 1025, citing Scott v. Thompson, 4 Bos. & P. 181; Greene v. Elmslie, Peake, 278; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279; Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 89; Lee v. Gray, 7 Mass. 349; Richardson v. Maine Ins. Co., 6 Mass. 102. Not all these authorities are, however, directly in point on the main question in the text. "Nor does it seem to be material that the peril which the ship thus endeavors to escape should be one which is insured against." And again: "The weight of authority seems to be in favor of the view that a departure from the course to avoid a peril, although that peril is not insured against, is no deviation": 2 Parsons on Marine Insurance, ed. 1868, 31-32, note 1. See Suydam v. Marine Ins. Co., 2 Johns. (N. Y.) 138. "A deviation is proper . . . . when necessary . . . . to avoid a peril, whether insured against or not": Deering's Annot. Civ. Code Cal., sec. 2695, subd. 2. Contra, Budd v. Eaton, 10 Mass. 21; Roget v. Thurston, 2 Johns. (N. Y.) 248; Murden v. South Carolina Ins. Co., Mill Const. (S. C.) 96; O'Reilly v. Royal Exch. Assur. Co., 4 Camp. 246, per Gibbs, C. J.

[280] See sec. 2370, herein.

[281] Walsh v. Homer, 10 Mo. 6; 45 Am. Dec. 342; Crousillat v. Ball, 4 Dall. (U. S.) 294; 3 Yeates (Pa.), 375; Kettel v. Wiggin, 13 Mass. 68; Martin v. Delaware Ins. Co., 2 Wash. (C. C.) 254.

cases of this character, where the loss occurs after a temporary deviation and return in safety to the permitted waters, and a loss occurs not at all connected with the breach of condition, the insurers are held not discharged,[282] and if it be admitted, as is claimed by some writers, that there may be a temporary deviation under other policies than those within the class mentioned,[283] it must also be admitted that a similar rule would apply.

§ **2444. Waiver of Deviation.**—That the insurer, having full knowledge, may waive the deviation is undoubted, but such waiver must be by some unequivocal act; as where the underwriters signed a memorandum that a specified deviation should not prejudice the insurance,[284] or where a contract is made healing the deviation assented to by the company's president, and written on the policy by his order, although it may not have been recorded by the secretary,[285] or where the policy is subscribed with the knowledge of the deviation by the underwriter.[286] But if there are two deviations, and one is expressly waived by memorandum, this excludes the claim that the other, although a previous one, has been waived,[287] although it is also held that a writing waiving a deviation for an additional premium covers all previous deviations,[288] and where under such a memorandum there was a misstatement as to the place to which the return voyage was made, it was held of no effect.[289]

§ **2445. Deviation—Acts of Third Person.**—The insured is not responsible for the acts of third persons done in consequence of a misfortune occurring during the voyage, from which misfortune alone, and not from any act of the owner or

[282] Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317. See secs. 2372-74, herein.

[283] See sec. 2373, herein.

[284] Glidden v. Manufacturers' Ins. Co., 1 Sum. (C. C.) 232.

[285] Warren v. Ocean Ins. Co., 16 Me. 439; 33 Am. Dec. 674.

[286] Coles v. Marine Ins. Co., 3 Wash. (C. C.) 159. See Redmond v. London, 3 Camp. 503; 5 Taunt. 462.

[287] Glidden v. Manufacturers' Ins. Co., 1 Sum. (C. C.) 232.

[288] Crowninshield v. New York Ins. Co., 3 Johns. (N. Y.) 142.

[289] Glidden v. Manufacturers' Ins. Co., 1 Sum. (C. C.) 232.

his agents, such third persons derived their power to interfere, although the same acts would have avoided the policy had they been done by the assured or his agents, as in case where the vessel was driven into a port of necessity, and while there it was claimed, together with its cargo, by the assured's correspondent, but it was referred to the American consul there, who procured a survey and sold the cargo, putting in a lighter one, because he deemed the vessel overloaded, dispatched the vessel to her return port in command of a British subject, and it was held that the American consul could not be considered the assured's agent, although the act of changing and adding to the cargo, if done by the assured or his agents, would have been a change of risk.[290]

[290] Winthrop v. Union Ins. Co., 2 Wash. (C. C.) 7.

CHAPTER LIII.

OTHER OR DOUBLE AND OVER INSURANCE.

§ 2455. What is other or double insurance.
§ 2456. Overinsurance.
§ 2457. Conditions as to other insurance.
§ 2458. Construction of conditions as to other insurance.
§ 2459. Where other insurance is only temporary.
§ 2460. Subsequent marine policy suspended where property fully covered by other insurance at time of issuance.
§ 2461. Warranted "uninsured": "Honor policy": Marine.
§ 2462. Representations concerning other insurance.
§ 2463. Policy outstanding at time of application for insurance surrendered before issuance of subsequent policy.
§ 2464. Subsequent policy must cover same or part of same property.
§ 2465. Insurance on ship and advances.
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§ 2468. Policy to different joint owners of property: Tenant in common.
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§ 2471. Insurance by stranger will not constitute other insurance.
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§ 2473. Where part of insured property is covered by subsequent policy.
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§ 2476. Interim receipts.
§ 2477. Subsequent voidable policy treated as valid after loss.
§ 2478. Prohibition against other insurance, whether "valid or invalid."
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§ 2494. Agreement between insurers to share expenses of suit pro rata.
§ 2495. Effect under pro rata clause of payment by any company of more than its share.
§ 2496. American clause, "shall only be liable for deficiency."
§ 2497. Where policies of different dates attach and property subsequently diminished.
§ 2498. Presumption as to basis of settlement where settlement made with one of two insurers.
§ 2499. Double insurance for whom it may concern.

§ 2455. What is Other or Double Insurance.—Other or double insurance exists where two or more policies of insurance are effected upon the same interest in the same property against the same risk, and either in the name or for the benefit of the same person.[1] "A double insurance is where one

[1] Thurston v. Koch, 4 Dall. (C. C.) 348-51; Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 30 Am. Dec. 90; Mussey v. Atlas Ins. Co., 14 N. Y. (Kern.) 79; Root v. Cincinnati Ins. Co., 1 Disn. (Ohio) 138; Peters v. Delaware Ins. Co., 5 Serg. & R. (Pa.) 473-84, per Duncan, J.; Sloat v. Royal Ins. Co., 49 Pa. 14-18; Merrish v. Germania Ins. Co., 54 Pa. St. 477; Royal Ins. Co. v. Roedel, 78 Pa. St. 19-22; Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28-35; Clarke v. Western Assur. Co., 23 Atl. Rep. 248; 21 Ins. L. J. 281; Godin v. London Assur. Co., 1 Burr. 489-95; Irving v. Richardson, 1 Moody & R. 153;

insures the same thing twice over against the same perils; . . . . where one procures an insurance from one underwriter against the danger of the seas, from another against the danger of the enemy, from a third against the barratry of the master, etc., although these several insurances are upon the same ship, they are not double, because the assured can never receive more than one satisfaction." [2] It is not necessary that the insurance be effected in the same name to constitute double insurance. Lord Mansfield says:[3] "If the same man really and for his own proper account insures the same goods doubly, though both assurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing, for the same person is to have the benefit of both policies." [4] Over or double insurance is not reinsurance. Reinsurance is the making of a contract by the insurer in order to secure himself, while other and double insurance is where the different insurances are effected by the insured as we have stated.[5] In case of double insurance, unless otherwise stipulated, the respective insurers are liable pro rata, all the policies being considered as together making but one policy. But where two policies cover the same property, but one also covers additional property without specifying how much of the insurance applies to each property, a case of

2 Barn. & A. 193; Rapalje & Lawrence's Law Dictionary, 668; Perkins v. New England M. Ins. Co., 12 Mass. 214-17; Hall v. Concordia F. Ins. Co., 90 Mich. 403; 51 N. W. Rep. 524; Peoria F. & M. Ins. Co. v. Lewis, 18 Ill. 553; Baltimore F. Ins. Co. v. Nancy, 20 Md. 20; California Ins. Co. v. Union etc. Co., 133 U. S. 730; 19 Ins. L. J. 385; 10 Sup. Ct. Rep. 385.

[2] Perkins v. New England M. Ins. Co., 12 Mass. 214-17.

[3] Godin v. London Assur. Co., 1 Burr. 489; 1 W. Black. 103.

[4] See, also, Phœnix Ins. Co. v. Copeland, 86 Ala. 551; Hough v. People's F. Ins. Co., 36 Md. 398; Van Aylstyne v. Ætna Ins. Co., 14 Hun (N. Y.), 360.

[5] Davis v. Gildart, 1 Marshall on Insurance, 2d Am. ed., 148. Mr. Marshall says: "It differs from reinsurance in this, that it is made by the insured with a view of receiving a double satisfaction in case of loss, whereas a reinsurance is made by a former insurer, his executors or assigns, to protect himself and his estate from the risk to which they were liable by the first insurance": 1 Marshall on Insurance, 2d Am. ed., 146.

double insurance does not arise; certainly not as to the whole amount of such policies.[6]

§ **2456. Overinsurance.**—The words "other insurance," "double insurance," and "overinsurance" are used in most instances as if synonymous. They are, in fact, practically the same, yet overinsurance more particularly refers to that class of cases not simply where "other insurance" is prohibited, but rather to that class where the policy prohibits the insurance beyond a certain amount. The same principle naturally controls in case of overinsurance as in case of other or double insurance. Different persons may insure different interests in the property. So when a sheriff seizing an insured vessel effected insurance to cover harbor risks, and this together with the insurance held by the owners exceeded the amount named in a prohibitory clause in the policy providing that it should become void if any interest already insured should be insured to exceed a certain sum, the interests insured are not the same, and the policy cannot be avoided on the ground of excessive insurance.[7] So an overinsurance of the freight to be earned on a voyage is not a breach of the warranty by the owner of a vessel that he will not insure his interest in the vessel beyond a specified amount.[8] In Pennsylvania a policy of fire insurance upon buildings contained a stipulation "that the aggregate amount insured in this and other companies . . . . shall not exceed two-thirds of the estimated cash value." The insurance was for thirteen hundred dollars, and the estimated cash value according to the policy was nineteen hundred and fifty dollars; subsequently improvements were made and an additional insurance of one thousand dollars was effected in another company. The buildings were destroyed by fire and their value at the time of the fire was four thousand two hundred dollars. In an action on the first policy it was held that the "estimated

[6] Clarke v. Western Assur. Co., 146 Pa. St. 561; 28 Am. St. Rep. 821. But see sec. 2472, herein.

[7] Marigny v. Home Ins. Co., 13 La. Ann. 338; 71 Am. Dec. 511.

[8] Merchants Mut. Ins. Co. v. Allen, 121 U. S. 67; 1 Sup. Ct. Rep. 821; 122 U. S. 376; 7 Sup. Ct. Rep. 1248.

cash value" was that at the time of the first insurance, and that the first policy was void for overinsurance.[9]

§ **2457. Conditions as to Other Insurance.**—An ordinary provision of policies of insurance is that in case of other or double insurance upon the property covered by the policy, without the consent of the insurers, the policy shall be void. The object of this provision is to prevent the moral hazard from being increased without the knowledge of the insurer who has assumed the risk. Though the insured may in all cases have an interest in the preservation of the property, yet it is certainly true that the motive for its preservation would not be as strong if several policies existed upon the property amounting to a sum in excess of the actual value of the same. In such cases the insured might not be as watchful and careful of the acts of others as he would if the property were not as fully protected. And not only is such a provision a protection against the gross carelessness of the insured in respect to his own acts and the acts of others, but it also tends to prevent any motive existing for the fraudulent destruction of the property by the insured. The condition is a valid one, and will be enforced by the courts.[10] Therefore, as a general rule, procuring additional valid insurance in violation of an express condition in the first policy without the written consent of the insurer avoids the policy, unless the company has waived the right to insist upon such forfeiture.[11]

§ **2458. Construction of Conditions as to Other Insurance.**—A condition in a policy of insurance that it shall be void in case of other insurance has been construed as meaning that the policy is voidable at the option of the insurer, and not absolutely void.[12] In such a case, though the facts of

[9] Elliott v. Lycoming Co. Mut. Ins. Co., 66 Pa. St. 22; 5 Am. Rep. 323.

[10] O'Leary v. Merchants' Ins. Co. (Iowa, 1896), 66 N. W. Rep. 175; Liverpool etc. Ins. Co. v. Verder, 35 Mich. 395; Sanders v. Cooper, 115 N. Y. 279; Queen Ins. Co. v. Young, 86 Ala. 424; 11 Am. St. Rep. 51.

[11] Queen Ins. Co. v. Young, 86 Ala. 424; 11 Am. St. Rep. 51.

[12] Turner v. Meridian F. Ins. Co., 16 Fed. Rep. 454; Hubbard v. Hartford F. Ins. Co., 33 Iowa, 325.

other insurance may not be known to the insurer upon the first policy until after the loss, yet it is a good defense.[13] Where the insurer after loss interposes other insurance as a defense, and the defense is sustained, it is held to amount to an election to avoid the policy at the time the other insurance was effected, and consequently to render a premium note void from that moment for want of consideration as to all future risks and losses.[14] Where the policy provides that a person insuring must give notice of "any other insurance effected," it refers to both prior and subsequent insurance.[15] So also do the words "additional insurance."[16] A condition in a policy that "if any other insurance be made which together with this shall exceed, etc.," has been held to refer only to subsequent insurance.[17] The word "assigns" in the clause "if the said insured or assigns shall hereafter make any other insurance" has been construed as meaning the assignees of the policy, and not of the property.[18] In the standard form of fire insurance policy for New York the policy is conditioned to be void "if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by the policy."

§ 2459. Where Other Insurance is Only Temporary.—A temporary violation of the condition in a policy is held to render the policy inoperative only during the time while such other insurance exists. In such a case if there is no other insurance at the time of the loss, it is held that there may be a recovery on the policy first issued, since after the other insurance has ceased the prior policy becomes operative, the same as if the subsequent insurance had not been effected.[19]

[13] Turner v. Meridian F. Ins. Co., 16 Fed. Rep. 454.

[14] Tuckerman v. Rigler, 46 Barb. (N. Y.) 375.

[15] Warwick v. Monmouth Co. M. F. Ins. Co., 44 N. J. L. 83; 43 Am. Rep. 343; Harris v. Ohio Ins. Co., 5 Ohio, 466.

[16] Behrens v. Germania Ins. Co., 56 Iowa, 26.

[17] Massey v. Atlas Mut. Ins. Co., 14 N. Y. (4 Kern.) 79.

[18] Bates v. Commercial Ins. Co., 1 Cinc. (Ohio) 523.

[19] New England F. & M. Ins. Co. v. Schletter, 38 Ill. 167; Germania Ins. Co. v. Kleure, 129 Ill. 599; 22 N. E. Rep. 489; Obermeyer v. Globe Ins. Co., 43 Mo. 573. See, however, sec. 2239 and note, herein, as to effect of temporary violation, etc., of conditions.

§ 2460. Subsequent Marine Policy Suspended where Property Fully Covered by Other Insurance at Time of Issuance.—A frequent provision in marine policies is that if there be any prior insurance upon the property insured then the insurer shall only be liable for so much of the amount of the prior insurance as shall be deficient toward fully covering the property at risk. Under such a stipulation if the property is fully covered by insurance at the time the subsequent insurance is effected, then the subsequent policy will be suspended only, and will attach if at any time before a loss and during the term for which the policy is issued the prior insurance ceases to attach, or does not fully cover the property at risk.[20] Thus where the owners of a vessel, a few days before the expiration of a policy thereupon, obtained another policy upon the same vessel at and from Boston to Charleston, which contained such a condition, it was held that though the first policy continued in full force until after the vessel had sailed from Boston, the second policy attached immediately upon the expiration of the first, and the insured could recover for a loss subsequently occurring.[21]

§ 2461. Warranted "Uninsured"—"Honor Policy"—Marine Risk.—An important decision in this connection was rendered in England in 1895 under a policy upon a marine risk, wherein there was a warranty that the subject matter, the hull and machinery of a vessel, was uninsured, and the question was involved whether certain "honor" policies void under the statute 19 George II, chapter 37, would, if they had been on the same subject matter, have operated as an infringement of the warranty, and it was said by the court, per Kennedy, J.: "I am of opinion that the clause ought to be construed as a warranty by plaintiff that as to the five thousand pounds he was not covered by any such insurance as is treated in practice and according to the usage of commercial men as an effectual insurance. It is merely another way of putting the same thing to say that we ought not to read into

[20] Murray v. Insurance Co., 2 Wash. (C. C.) 186.
[21] Kent v. Manufacturers' Ins. Co., 18 Pick. (Mass.) 19.

the warranty the words 'by any policy not invalid in point of law.' " [22] Upon appeal, however, this case was decided upon another point, and Lord Esher, M. R., says as to this question, that it was unnecessary to deal with it. "But it must not be assumed that I assent to the view of the learned judge on this point." And Smith L. J., says: "With regard to 'honor' policies as being a breach of the warranty, the business meaning of the warranty was to secure that the shipowner would be careful in the management of his ship by his remaining uninsured to the extent of five thousand pounds. It is not necessary to decide the point; but I am not satisfied that, by reason of his having a policy upon which he could not recover at law, the shipowner would cease to be his own insurer." [23] And it would seem that the main point which ought to decide the question would be whether there could be a re-

[22] Roddick v. Indemnity Mut. Mar. Ins. Co. (1895), 1 L. R. Q. B. D. 836. The court also said: "The plaintiff's counsel . . . . argued that the 'honor policy,' being null and void by statute, was no insurance at all, and therefore . . . . the plaintiff was uninsured within the meaning of the warranty, even if the subject matter was in part the same subject matter as that of the policies on 'hull and machinery'. . . . . I am of opinion that plaintiff is wrong, and that the 'honor' policies . . . . cannot be disregarded in reference to this warranty on account of their legal invalidity. A curious result would follow if they could be. The main, if not the whole, object of the warranty is to give the insurer a pledge of the good faith of the assured and of his diligence in preserving the thing assured by reason of remaining his own insurer to the extent specified in the warranty. It was admitted in the course of the argument, and it could not but be admitted, that a claim under an 'honor' policy is regularly recognized and discharged by the underwriter as faithfully and as promptly as a claim under a policy which is not open to the same legal objection. Therefore, if this contention on behalf of the plaintiff is right, he might after giving this warranty have straightway gone and safely defeated its purpose, by covering by 'honor' policies on 'hull and machinery' the whole of the five thousand pounds which he warranted uninsured. Looking alike at the obvious aim of such a warranty as this and the fair meaning of the word 'uninsured' in a commercial document of this kind, it must be taken to have been understood both by assurer and assured by the light of their common knowledge and of the universal treatment of an 'honor' policy in the insurance world."

[23] Roddick v. Indemnity Mut. M. Ins. Co. (1895), 2 L. R. Q. B. D. 380, 384, 386.

covery at law; not whether the underwriters consented to pay because of a practice so to do, but whether they could, should they choose, successfully rest upon the defense that the "honor" policy was void at law. If insured has a policy not legally enforceable, has he, as it is clearly put by Smith, L. J., ceased "to be his own insurer?" We believe not.

§ 2462. Representations Concerning Other Insurance. Representations as to other insurance will not in all cases where incorrect avoid the policy; as where the company is satisfied to rely on a mere statement of belief, instead of a positive assertion which the assured makes in good faith, they cannot set up the defense that the facts were not correctly stated.[24] So an approximate estimate made by assured from memory of amounts of insurance then existing on the property to the company's agent, who reported a definite sum to the company, and the agent had authority to act upon verbal statements, will not avoid the contract.[25] But a statement of mere belief as the amount of other insurance is not sufficient when made in response to a statement of the agent that the amount must be exactly stated where such amount is incorrect, and the answers of the insured in the application are made warranties, and in such case there can be no recovery.[26] If the actual amount of other insurance does not exceed the amount stated, a slight mistake as to the amount will not be considered material,[27] nor will a mistake as to the name of the other insurer,[28] but a representation as to the amount of insurance upon the property may be so much in excess of the actual insurance as to be considered material, and thus avoid the policy.[29] As a general rule, if the statement is one upon which the insurers have a right to rely, or it is made a warranty by the terms of the policy, and it is not in fact a true

[24] Bridgewater Iron Works Co. v. Enterprise Ins. Co., 134 Mass. 433.

[25] Hornthal v. Western Ins. Co., 88 N. C. 71.

[26] Commonwealth M. F. Ins. Co. v. Huntsinger, 9 Pa. St. 41.

[27] Osser v. Provincial Ins. Co., 12 U. C. C. P. 141.

[28] Osser v. Provincial Ins. Co., 12 U. C. C. P. 141.

[29] Armour v. Transatlantic Ins. Co., 90 N. Y. 450.

statement of the actual facts, and is misleading, then no recovery may be had upon a policy which is issued based upon such statement.[30] A representation that other insurance to a certain amount exists at the time of taking out the policy, when in fact it does not, will not justify the insured in taking out subsequent policies in other companies to the amount named.[31]

§ 2463. **Policy Outstanding at Time of Application for Insurance Surrendered before Issuance of Subsequent Policy.**—Though the insured may insert a statement in his application for insurance that there is no other insurance upon the property, and there is in fact a prior policy in existence, yet it is held that if he surrenders this prior policy before the subsequent one is issued, the condition in the subsequent policy as to "prior and subsequent insurance" will not be violated.[32]

§ 2464. **Subsequent Policy must Cover Same or Part of Same Property.**—As we have already stated, the subsequent policy must cover the same or at least part of the same property as is covered by the prior policy. If it does not, then it will not constitute double or other insurance. So an insurance on goods in the store is not within the rule of an insurance company making void the policy on the store in case the assured shall be allowed to insure the same or "any other property connected with it in any other company or any other office."[33] The fact that the insured had insured in other companies is no defense if the policies do not legally cover the same property though there may be some mingling of the goods.[34] Where the policy covered a "carpenter's shop and carpenter tools," it was held that, although another policy was

[30] Clapp v. Massachusetts B. Assn., 146 Mass. 519; London Ins. Co. v. Mansel, 11 T. R. Ch. D. 393.

[31] Conway Tool Co. v. Hudson River Ins. Co., 12 Cush. (Mass.) 144.

[32] Train v. Holland Ins. Co., 68 N. Y. 208.

[33] Jones v. Maine Mut. F. Ins. Co., 18 Me. 155. See, also, Illinois Mut. F. Ins. Co. v. O'Neil, 13 Ill. 89.

[34] Boatman's F. & M. Ins. Co. v. Hocking (Pa. 1887), 8 Atl. Rep. 417.

issued to the same person upon "four chests of carpenters' tools in a wood shop," which was described as being in the same street as the property described in the first policy, it was not proof that any part of the property was covered by both policies where it appeared that there were two chests in the shop belonging to the assured and two or three belonging to the workmen.[35]

§ **2465. Insurance on Ship and on Advances.**—If an insurance is effected upon a ship and also upon "advances," this will not constitute double insurance where it is evident from the construction of the policy that the advances are independent of and distinct from the ship, and are intended so to be insured; as in a case where the ship's valuation was fixed at one hundred thousand dollars, and there had been the sum of ninety-five thousand dollars paid on the policies and also twenty-eight thousand seven hundred and fifty dollars on account of advances, it was held, in an action to recover on a five thousand dollar policy, that there was no double insurance.[36]

§ **2466. Insurance against Different Perils.**—As we have previously stated,[37] the insurance must be upon the same property, for the benefit of the same person, and against the same risk, in order to be within the meaning of a provision as to other insurance. All these conditions must unite.

[35] Clark v. Hamilton Ins. Co., 9 Gray (Mass.), 148.

[36] Providence-Washington Ins. Co. v. Bowring (U. S. C. C. A. 1892), 53 Fed. Rep. 613. This was a case where a policy was effected at Lloyds "on advances." The policy was the common form of Lloyds' valued policies, printed with blanks for the insertion of the particular terms of the contract to be superadded to the printed parts. The court said: "When the words 'on advances,' together with the valuation, are inserted, they cannot be taken to mean any part of the ship or cargo, because all these are already described not only in the valuation clause but in the general clause descriptive of the insured property. . . . . The sensible construction of a policy like this now in controversy is that it insures advances against risk from the loss of the ship, and the advances thus insured are something independent of and distinct from the ship herself."

[37] See sec. 2455, herein.

Therefore, the same property may be insured against different perils,[38] and it will not constitute other insurance.[39]

§ 2467. Where Insurances are upon Different Interests or do not Cover Same Subject.—If different persons have different interests in the same subject of insurance each may insure his interest, and this will not constitute other or double insurance.[40] A policy of fire insurance containing a stipulation against "other insurance" is not invalidated by the fact that at the time of its issuance a prior policy covering the same property is in existence, unless the assured has an interest in such prior policy, or will derive a benefit under it in the event of the burning of the property.[41] So where a policy provided against other insurance, it was held that an insurance by a partner of his undivided interest did not avoid the

[38] See sec. 2466, herein.

[39] A case upon this point arose in England. Insurance against fire was effected to the amount of three thousand pounds upon wool in any shed or station or in transit by land only, or in any shed, store, or on the wharf in Sydney until placed on ships. The policy was conditioned to be void in case of other insurance. The insured then procured a subsequent marine policy for sixteen thousand five hundred pounds on wool to be carried by ship from Hunter to Sydney, and from thence to London by ships. The policy carried the risk of craft from the time the wool was first waterborne, and of transshipment or landing and reshipment at Sydney. It was the custom of stevedores at Sydney to have the wool taken to their stores, where it was pressed and taken to the ship. The wool, upon the arrival of the ship at Sydney, was transferred by the plaintiff's agent to his store. The agent entered into a contract for its shipment by water to London. After having the wool weighed, it was transferred from his store to the warehouse of the ship's stevedore, and while there it was in part destroyed by fire. In an action to recover it was held that there was no other insurance within the meaning of the provision, as the policy covering the marine risk did not attach while the wool was in the warehouse of the stevedore: Australia Agr. Ins. Co. v. Sanders, 10 L. R. Com. P. 668.

[40] Perkins v. New England Ins. Co., 12 Mass. 214; Whittwell v. Putnam F. Ins. Co., 6 Lans. (N. Y.) 166; Rowley v. Empire F. Ins. Co., 4 Abb. Dec. (N. Y.) 131; 30 N. Y. 550; 42 N. Y. 557; Lowell Mfg. Co. v. Safeguard F. Ins. Co., 88 N. Y. 591; Mills v. Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103; Godin v. London Assur. Co., 1 Brun. 489-93, per Lord Mansfield; 1 W. Black. 103.

[41] Copeland v. Phœnix Ins. Co., 96 Ala. 615; 38 Am. St. Rep. 134.

policy.[42] An agreement between different owners of property that one of them shall take out the insurance upon said property in his own name does not amount to double insurance.[43] Different merchants who have been supplying a dealer with stock may each insure his interest, and it will not constitute other or double insurance.[44] Nor will it in case of insurance by both pledgor and pledgee,[45] or by vendor and vendee.[46] But where the vendee of goods procured a policy prohibiting other insurance, and assigned it to the vendor with insurer's consent, and then executed a subsequent insurance for his own account, it was held that the second policy was void.[47] And insurance by both shipper and carrier will not constitute other insurance,[48] or by lessor and lessee,[49] or by consignor and consignee,[50] except where the policy is procured by the consignee to protect both his interest and that of the consignor, and in such a case so much of the insurance as will be for the protection of the consignor will be double or other insurance.[51] So also where B had a bond from A for an undivided half of a mill, and gave a bond back to keep it in repair, and also agreed that A might get it insured at his expense to secure him for the debt, and A procured an insurance on the whole mill, it was held that the insurance by A was not a double insurance.[52] Insurance may be effected by the grantee of the equity of redemption and by the mortgagee in the cases where the sale or transfer of the property by the

[42] Hall v. Concordia F. Ins. Co., 90 Mich. 403; 51 N. W. Rep. 524.

[43] Burbank v. Rockingham Ins. Co., 24 N. H. 550; 57 Am. Dec. 300.

[44] Roos v. Merchants' Ins. Co., 27 La. Ann. 409.

[45] Nussbaum v. Northern Ins. Co., 37 Fed. Rep. 524.

[46] Southern Ins. Co. v. Lewis, 42 Ga. 587; Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 30 Am. Dec. 90; Ramsey v. Phœnix Ins. Co., 1 Fed. Rep. 396.

[47] Neie v. Columbia Ins. Co., 2 McMull. (S. C.) 220; Leavitt v. Western F. & M. Ins. Co., 7 Rob. (La.) 351.

[48] Royster v. Roanoke Steamship Co., 26 Fed. Rep. 492.

[49] Mitchall v. Home Ins. Co., 32 Iowa, 421; Planters' Ins. Co. v. Rowland, 66 Md. 236.

[50] William v. Crescent Mut. Ins. Co., 15 La. Ann. 651; Shaw v. Ætna Ins. Co., 49 Mo. 578; Herkimer v. Rice, 27 N. Y. 173.

[51] Home Ins. Co. v. Baltimore Warehouse, 93 U. S. 324.

[52] Burbank v. Rockingham Ins. Co., 24 N. H. (Fost.) 550.

mortgagor will not defeat the mortgagee's policy, and such insurance will not be in violation of a condition in the mortgagee's policy requiring notice of other insurance.[53]

§ 2468. **Policy to Different Joint Owners of Property—Tenants in Common.**—Where several persons own property as tenants in common, and have effected a policy thereon which forbids other insurance, a subsequent policy effected by one of the tenants without mention of the joint ownership will constitute other insurance within the meaning of the prohibition.[54] And a policy conditioned to be void if there be any prior insurance is held to be avoided by a prior policy in the name of one of the joint owners only.[55] In Kentucky, it has been held that insurance by several joint owners may be made on their respective interests at different offices, notwithstanding a provision in each policy "that it shall be void in case any other insurance is effected on the same property without notice." Such a provision applies only to a second insurance in case the policy is forfeited.[56]

§ 2469. **Insurance by Owner of Land and Person Holding under Contract for Deed.**—Both the owner of land and a person holding possession under a contract for a deed may each insure his interest, and in such a case if the policy to the person holding possession under such a contract contains a condition forbidding other insurance, a subsequent policy to the owner will not avoid the prior policy.[57]

§ 2470. **Different Interests—Mortgagor and Mortgagee.**—The general rule that different persons each having a different interest in property may insure that interest also prevails where different policies are effected by the mort-

[53] City F. Sav. Bank v. Pennsylvania Ins. Co., 122 Mass. 165.

[54] Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.

[55] Horridge v. Dwelling etc. Ins. Co., 75 Iowa, 374; 39 N. W. Rep. 648.

[56] Insurance Co. v. Drake, 2 B. Mon. (Ky.) 47; Woodbury Sav. Bank v. Charter Oak F. & M. Ins. Co., 31 Conn. 518.

[57] Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 12 Wend. (N. Y.) 507.

gagor and mortgagee upon the property. The mortgagor may insure the property to cover his interest, and the mortgagee may likewise insure his interest in the property, and it will not be within the meaning of the clause as to other insurance.[58] If a policy is procured in the name of the mortgagor, and is merely made payable to the mortgagee as his interest may appear, and the mortgagor subsequently procures additional insurance, the policy will be avoided if conditioned to be void in case of other insurance.[59] A mortgagee may be bound by the stipulations of a policy so that the policy will be defeated by subsequent unauthorized insurance, although obtained by and insuring the interest of one of the mortgagors only.[60] So where a husband and wife mortgaged the wife's premises, and procured an insurance thereon payable to the mortgagee as his interest might appear, and the policy was conditioned to be void in case of subsequent insurance, whether valid or not, without consent written on the policy, and the wife alone procured another policy of insurance in her own name, it was held, first, that the first insurance was of the mortgagor's, and not of the mortgagee's, interest, and second, that the first insurance was avoided by the second.[61] And where a policy

[58] Woodbury v. Charter Oak Ins. Co., 31 Conn. 517; Niagara F. Ins. Co. v. Scammon, 35 Ill. App. 582; 20 Ins. L. J. 119; Nichols v. Fayette Ins. Co., 1 Allen (Mass.), 63; Wheeler v. Watertown F. Ins. Co., 131 Mass. 1; Guest v. New Hampshire F. Ins. Co., 66 Mich. 98; 33 N. W. Rep. 31; Traders' Ins. Co. v. Roberts, 9 Wend. (N. Y.) 404.

[59] Lias v. Roger Williams Ins. Co., 8 Fed. Rep. 187; 9 Ins. L. J. 154; Van Alstyne v. Ætna Ins. Co., 14 Hun (N. Y.), 366; Hine v. Homestead F. Ins. Co., 29 Hun (N. Y.), 84; 93 N. Y. 75; Perry v. Lorillard F. Ins. Co., 61 N. Y. 214; Gillett v. Liverpool Ins. Co., 73 Wis. 203.

[60] In this case the mortgage provides that if the mortgagors failed to insure the property, the mortgagee may insure the same, the expense thereof being added to the mortgage debt, and the mortgagee applies for insurance on the property to secure his interest therein, and a policy is issued running to the mortgagors, but providing that the loss, if any, shall be payable to the mortgagee, and contains a stipulation avoiding the policy if the insured obtains additonal insurance without consent of the company, and the mortgagee pays the premium and retains the policy without objection for nearly a year before the property is burned: Gillett v. Liverpool etc. Ins. Co., 73 Wis. 203; 9 Am. St. Rep. 784.

[61] Continental Ins. Co. v. Hulman, 92 Ill. 145; 34 Am. Rep. 122.

was issued in the name of the owner of a vessel which was mortgaged, and the policy was assigned to the mortgagee, and the mortgagor subsequently procured another policy, it was held that the assignee's right to recover was defeated.[62] A policy in the name of the mortgagor alone which contains such a condition will, it is held, be avoided where one of the mortgagors procures a subsequent insurance, though the former policy was procured and paid for by the mortgagee.[63] In these cases it will be seen that the person who procures the insurance, or in whose name it is issued, retains his interest in the first policy at the time of procuring the second. If, however, the policy has been assigned by the mortgagor to the mortgagee, so as to transfer all interest in the policy and to constitute it a new contract between the mortgagee and the insured, there will be no reason why the mortgagor might not procure a subsequent policy in his own name to protect his interest in the mortgaged property, and such insurance would not be other or double insurance. Where a fire policy issued by the G. Company to M., payable to T. as mortgagee, contained a clause avoiding it in case of other insurance without G's written consent, etc., and T., without M's knowledge, procured insurance in the H. Company, and after the loss M. made the formal proof required to procure payment of the H. insurance, it was held that there was no default or ratification by M. that would avoid the G. policy.[64] Persons holding under different mortgages may each insure the property to protect their interest.[65] It has been held if a policy contains a warranty that no other insurance exists, that the fact that the insured had no knowledge of other insurance is not always conclusive.[66]

§ 2471. Insurance by Stranger will not Constitute Other Insurance.—If a stranger without the knowledge and

[62] Buffalo S. etc. Works v. Sun Mut. Ins. Co., 17 N. Y. 401.

[63] Gillett v. Liverpool etc. Ins. Co., 73 Wis. 203; 41 N. W. Rep. 78.

[64] Titus v. Glen's Falls Ins. Co., 81 N. Y. 410; 8 Abb. N. C. (N. Y.) 315. See, also, Robert v. Traders' Ins. Co., 17 Wend. (N. Y.) 61.

[65] Fox v. Phœnix Ins. Co., 52 Me. 353.

[66] Phœnix Ins. Co. v. Copeland, 86 Ala. 551.

consent of the owner of the property, or the person having therein an insurable interest which he has protected by a policy of insurance, procures a policy upon the property, this will not constitute other insurance such as will be within the meaning of a prohibition as to other insurances,[67] unless the subsequent insurance is ratified by the insured under the prior policy; as where a father procured insurance in his son's name, and the latter accepted payment under such policy for a loss, it was held that the prior policy was avoided.[68] If persons interested in property have procured insurance thereon, though in the name and for the benefit of the person procuring the subsequent policy, yet it is held that the subsequent insurance will not be within the meaning of a condition in the prior policy prohibiting other insurance where it appears that the person procuring the subsequent policy was not aware of the issuance of the prior policy.[69]

§ 2472. Subsequent Insurance Covering Property First Insured and Other Property.—Where a policy contains a clause forbidding other insurance, it is held that it does not merely prohibit insurance of precisely the same property, but that the policy will be avoided by an insurance effected upon the property named in connection with other property.[70] In Pennsylvania, however, it has been held where one policy of insurance covers the building only, and a subsequent policy in another company covers the building, machinery, shafting, belting, tools, lathes, planes, drills, and stock, finished and unfinished, it is not a case of double insurance, and does not come within the meaning of a clause in the former policy pro-

[67] Franklin M. F. Ins. Co. v. Drake, 2 Mon. B. (Ky.) 47; London etc. F. Ins. Co. v. Turnbull, 86 Ky. 230; Fox v. Phœnix Ins. Co., 52 Me. 353; Rowley v. Empire Ins. Co., 4 Abb. Dec. (N. Y.) 131; 36 N. Y. 550; 42 N. Y. 557; Harris v. Ohio Ins. Co., Wright (Ohio), 544; Carpenter v. Prov. Ins. Co., 16 Pet. (U. S.) 501; Johnson v. North British etc. Ins. Co., 1 Holmes (C. C.), 117.

[68] De Fox v. Johnstown Ins. Co., 7 U. C. C. P. 55.

[69] Nichols v. Fayette Ins. Co., 1 Allen (Mass.), 63.

[70] Phœnix Ins. Co. v. Michigan etc. R. R. Co., 28 Ohio, 69; McMahon v. Portsmouth Ins. Co., 2 Fost. (N. H.) 15.

hibiting double insurance without notice.[71] But in New York an insurance of one thousand dollars on fixtures and three thousand dollars on stock, and a further insurance of five thousand dollars on stock and fixtures as one parcel, was held to be a case of double insurance.[72] And in another case where the first policy covered the "electric lamps, shades, wires, and all other electric fixtures and appurtenances," and the subsequent policies covered household goods and "fixtures of every description," there being no apportionment of the risk between the different kinds of property insured, it was held that it was not a case of double insurance, at least as to the whole amount of the policies.[73] If, however, the risk is apportioned, a separate amount upon each class of property insured, so that one of the classes would be the same as that covered by a prior policy, it would seem to clearly constitute a case of double insurance so as to avoid the prior policy.

§ 2473. Where Part of Insured Property Covered by Subsequent Policy.—If a policy apportions the insurance to different items or classes of property, a subsequent insurance upon one of the items or classes to which a separate sum is apportioned in the first policy will avoid that, at least as to the item or class subsequently insured.[74] In Massachusetts, it has been held [75] that in such a case the policy first issued is entirely avoided where the first policy prohibits other insurance upon the "property insured or any part thereof." So where a policy which was issued containing such a condition apportioned part to a building and part to the household goods and furniture therein, it was held that the taking of subsequent insurance upon merely the building would avoid the policy.[76] The question which arises in these cases is this, Does

[71] Sloat v. Royal Ins. Co., 49 Pa. St. 14; 88 Am. Dec. 477; Clark v. Western Assur. Co., 146 Pa. St. 561; 28 Am. St. Rep. 821.

[72] Ogden v. East River Ins. Co., 50 N. Y. 389; overruling Howard Ins. Co. v. Scribner, 5 Hill (N. Y.), 298.

[73] Clark v. Western Ins. Co., 146 Pa. St. 561; 33 Atl. Rep. 248; 21 Ins. L. J. 281.

[74] Illinois etc. Ins. Co. v. Fix, 53 Ill. 151; 5 Am. Rep. 38.

[75] Kimball v. Howard Ins. Co., 8 Gray (Mass.), 33.

[76] Havens v. Home Ins. Co. (1887), 111 Ind. 90; 12 N. E. Rep. 137.

the fact of the apportionment of the insurance to different items or classes of property of itself render the contract a divisible one, so that an insurance subsequently effected upon one of the items will only avoid the policy as to that item, or is the contract so entire that the whole policy is avoided?[77] The weight of authority seems to support the rule that if the amount of the insurance is not apportioned to different items or classes of property, but the contract is entire, then a subsequent insurance effected by the assured in the first policy upon a part of the property covered by such prior policy will defeat the entire policy.[78] The object of this condition in policies is to protect the insurer from any increased hazard due to overinsurance. By such a condition the insured has an interest in the preservation of the property, since in case of its destruction he will sustain no benefit, and will consequently be more watchful against fire; therefore, the property need not be the identical property covered in the first policy, but only a part thereof. If, however, the prior insurance is apportioned to different items, and the subsequent policy covers only one of those items, then it ought to consti-

[77] Upon this point the court, in Havens v. Home Ins. Co. (1887) 111 Ind. 90, 12 N. E. Rep. 137, said as follows: "In order, therefore, to give effect to the conditions according to the intent and purpose of the contract, it follows necessarily that where the property covered by one policy, although consisting of separate items, appears to be so situate as to constitute substantially one risk, then even though separate amounts of the insurance be apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible, the contract must be treated as entire nevertheless. To such a policy the principles governing entire and indivisible contracts are applicable, for the reason that the matter which renders the policy void as to part affects the risk of the insurer, in respect to the other items, in the same manner as it affects those items in respect to which the contract is voided. In such a case the only effect of apportioning the amount of the insurance upon the separate items of property specified in the policy is to limit the extent of the company's liability to the sum specified upon each item or class of property insured." See, also, sec. 2254, herein. Examine Sunderland v. Ætna Ins. Co., 18 Hun (N. Y.), 522.

[78] Assoc. F. Ins. Co. v. Assum, 5 Melvin 165; Liscom v. Boston Mut. F. Ins. Co. 9 Met. (Mass.) 205; Columbus Ins. Co. v. Walsh, 18 Mo. 229; Pitney v. Glen's Falls Ins. Co., 69 N. Y. 6. But see Quarrier v. Peabody Ins. Co., 10 W. Va. 507.

tute double insurance only as to that item, unless the contract is clearly an entire contract, or unless the policy is conditioned to be void in case of subsequent insurance upon the whole or any part of the property covered.

§ 2474. Where Insured Goods are Removed and Joined with Other Goods also Insured.—Where a policy of insurance contains a condition "that if any other insurance has been or shall hereafter be made upon the said property not consented to in writing herein this policy shall be null and void," and the stock of goods insured is removed and merged in another stock which is insured under policies covering accruing stock, the insurance on the latter will cover the former, and, if effected without the consent of the first insurer, the policy issued by him is void.[79] In a case which arose in New York, however,[80] it was held that where goods covered by a policy containing such a condition were removed and mingled with other goods of a similar nature, which were also insured, it was not a case of other insurance, as the two policies covered different goods.

§ 2475. Where Other Insurance is Void or Voidable—Prior or Subsequent Policies Conditioned against Other Insurance.—A policy of insurance conditioned to be void if there be any other insurance upon the property is not avoided by other insurance which is void upon its face.[81] In a recent case in Maryland, this question arose, and it was held

[79] Washington Ins. Co. v. Hayes, 17 Ohio St. 432; 93 Am. Dec. 628. See, also, Walton v. Insurance Co., 2 Rob. (La.) 263.

[80] Vose v. Hamilton Ins. Co., 39 Barb. (N. Y.) 302.

[81] American Ins. Co. v. Raflogel, 4 Ind. (L. ed.) 526; 13 Week. Rep. 358; 114 Ind. 1; David v. Hartford Ins. Co., 13 Iowa, 69; Behrens v. Germania Ins. Co., 64 Iowa, 19; Jackson v. Massachusetts M. F. Ins. Co., 23 Pick. (Mass.) 418; 34 Am. Dec. 69; Jackson v. Farmers' M. F. Ins. Co., 5 Gray (Mass.), 52; Obermeyer v. Globe Mut. Ins. Co., 43 Mo. 573; Hale v. Union Ins. Co., 32 N. H. 299; Gee v. Cheshire Ins. Co., 55 N. H. 65; Bilger v. New York Ins. Co., 20 Barb. (N. Y.) 635; 22 N. Y. 402; Firemen's Ins. Co. v. Holt, 35 Ohio St. 189; Stacy v. Franklin F. Ins. Co., 2 Watts & S. (Pa.) 506; Mitchell v. Lycoming Ins. Co., 51 Pa. St. 402; Neve v. Columbia Ins. Co., 2 McMull. (S. C.) 220.

that the first policy was not avoided by a second policy which was void ab initio.[82] All of the cases cited below do not directly hold that the policy is not avoided only in those cases where the other insurance is void upon its face, but many of them will be found to be in accord with the rule supported by a large number of cases, that in order to avoid a policy on account of subsequent insurance against an express condition therein, it must appear that such subsequent insurance is valid, and that the policy upon which it is made is capable of being enforced.[83] Where the subse-

[82] Sweeting v. Mutual F. Ins. Co. (Md. 1896), 34 Atl. Rep. 826. In this case the second policy was conditioned to be void in case of prior or subsequent insurance, whether valid or invalid. The court said: " 'Other insurance' does not mean a void policy which obviously affords no insurance at all, nor does it mean a policy which may, at the option of the underwriter, be canceled; for that is at least but conditional insurance. But it means a binding available insurance; one upon which the insured can rely for protection in case of loss, and which he can enforce by law, and which cannot be repudiated with impunity at the arbitrary election of the insurer. . . . . A second policy which by its own terms is void for any cause is not an insurance at all, and this is equally true whether the invalidity is apparent on the face of the policy itself or is made to appear by evidence aliunde the policy. It is not the method by which the invalidity of the second policy may be shown that determines whether it does or does not create a liability on the part of the underwriter who issues it, and therefore does or does not constitute a breach of the condition in the first policy against further insurance; but it is the fact that the second policy is valid and binding that alone fixes upon its underwriter a liability, and accordingly determines whether in this respect the condition against other insurance set forth in the first policy has been violated or not. . . . . If, then, its provisions be given the effect which the parties to it intended they should have, it is void and not merely voidable the moment the condition arises upon the occurrence of which the parties have declared it shall be invalid. And if thus invalid, it obviously does not create other insurance within the prohibition contained in the first policy. It would, then, be nothing more than an attempt to secure other insurance. An ineffectual attempt to secure insurance is confessedly no insurance."

[83] Hubbard v. Hartford F. Ins. Co., 33 Iowa, 325, per Beck, J. See, also, Wilson v. Queen's Ins. Co., 5 Fed. Rep. 674; New England Ins. Co. v. Schettler, 38 Ill. 166; Germania F. Ins. Co. v. Kleuer, 129 Ill. 599; 22 N. E. Rep. 489; Philbrook v. New England M. F. Ins. Co., 37 Me. 137; Lindley v. Union Ins. Co., 65 Me. 308; Hardy v. Union Ins. Co., 4 Allen (Mass.), 217; Clark v. New England Ins. Co., 6 Cush. (Mass.) 643; Thomas v. Builders' M. F. Ins. Co., 119 Mass. 121; 20

quent policy is invalid by reason of a misrepresentation as to other or prior insurance, a recovery may be had upon the prior policy.[84] In a case in Minnesota, however, it is held that a fire policy, conditioned to be void if the insured should thereafter insure the same property in another company without the consent of the insurer, is avoided by subsequent insurance void by its terms for misrepresentation.[85] There is a class of cases in line with this Minnesota case in which it is said that if the insured believed that the subsequent insurance was valid, then the prior policy is avoided or voidable at the option of the insurer, whether the subsequent insurance is in fact valid or not, since the same motives might move the insured to be less careful of the property, and the same motives would exist for a fraudulent destruction of the property as if it was in fact valid. Therefore, it is held that the policy is avoided, since the very motives exist which the insured intended to guard against, and the moral hazard is in fact increased.[86] Thus, where a contract of insurance, which covered a storehouse and

Am. Rep. 317; Keyser v. Hartford F. Ins. Co., 66 Mich. 664; Emery v. Mutual City Ins. Co., 51 Mich. 469; 47 Am. Rep. 590; Dahlberg v. St. Louis Ins. Co., 6 Mo. App. 121; Gale v. Belknap Ins. Co., 41 N. H. 170; Gee v. Cheshire Ins. Co., 55 N. H. 65; Schenck v. Mercer Co. Ins. Co., 24 N. J. L. 447; Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291; Knight v. Eureka Ins. Co., 26 Ohio St. 664; 20 Am. Rep. 778; Sutherland v. Old Dominion Ins. Co., 31 Gratt. (Va.) 176; Allison v. Insurance Co., 3 Dill. (C. C.) 480.

[84] Allison v. Phœnix Ins. Co., 3 Dill. (C. C.) 480; Lindley v. Union Ins. Co., 65 Me. 368; 20 Am. Rep. 701; Clark v. New England Ins. Co., 6 Cush. (Mass.) 342; 53 Am. Dec. 44.

[85] Funke v. Minnesota Farmers' Mut. F. Ins. Assn., 29 Minn. 347; 43 Am. Rep. 216.

[86] Carpenter v. Prov. Ins. Co., 16 Pet. (U. S.) 495; Turner v. Equitable Ins. Co., 16 Fed. Rep. 454; Lackey v. Insurance Co., 42 Ga. 456; American Ins. Co. v. Raplogel, 17 Ins. L. J. 456; Phœnix Ins. Co. v. Lamar, 106 Ind. 513; David v. Hartford Ins. Co., 13 Iowa, 69; Funke v. Farmers' Mut. F. Ins. Co., 29 Minn. 347; 43 Am. Rep. 216; Sanders v. Insurance Co., 86 N. Y. 414; 40 Am. Rep. 554; Suggs v. Hartford Ins. Co. (N. C.), 17 Ins. L. J. 62; Bigler v. New York Cent. Ins. Co., 20 Barb. 632; 22 N. Y. 402; Mitchell v. Lycoming Ins. Co., 51 Pa. St. 402; Somerfield v. State Ins. Co., 8 Lea (Tenn.), 547; 41 Am. Rep. 662; Royal Ins. Co. v. McCrea, 8 Lea (Tenn.), 581; 41 Am. Rep. 656; Mason v. Andes Ins. Co., 23 U. C. C. P. 37; Ramsay v. Insurance Co., 11 U. C. Q. B. 516.

the goods therein, provided that should the assured subsequently take out a policy in any other company, the assurers should receive notice of it on pain of forfeiting their policy, a subsequent assurance of the house or the goods in another company without notice to the assurers was held to work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not.[87] Where the subsequent insurance is merely voidable and not absolutely void on its face, it has been contended that the insurers under a prior

[87] Allen v. Merchants' Mut. Ins. Co., 30 La. Ann. 1386; 31 Am. Rep. 243. We have cited in the note preceding the last, under this last-stated principle, all the cases usually relied upon to sustain that ruling. Upon examination, however, it will be seen that many of them cannot be said to fully support the point. The case of Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495, has been briefly commented upon as follows in Hubbard v. Hartford F. Ins. Co., 33 Iowa, 325: "This case, we have observed, is often cited in support of this rule. . . . . If such a rule be found in the case—but it does not so appear to us—its enunciation was not called for by the facts before the court and made the basis of the decision. The policy upon which that suit was brought is considered in the opinion the second instrument, and the court holds that it was defective by a condition therein against prior insurance, which in fact existed when it was issued." In Lackeye v. Georgia Ins. Co., 42 Ga. 457, the court said: "The question here turns not so much upon the contract as upon our statute. . . . . And this law would make void the first policy, though nothing was said in it about a second policy." In Phœnix Ins. Co. v. Lamar, 106 Ind. 513 (see sec. 2478, herein), the prior policy was conditioned to be void in case of any other insurance "whether valid or not." In David v. Hartford F. Ins. Co., 13 Iowa, 69, the insurers in the subsequent policies treated the policies as valid after the loss had occurred, and paid the amount of the loss sustained. In Suggs v. Hartford F. Ins. Co. (N. C.), 17 Ins. L. J. 62 (see sec. 2478, herein), the prior policy was conditioned to be void in case of any other insurance, "whether valid or otherwise." In Bigler v. New York Cent. Ins. Co., 20 Barb. (N. Y.) 635, 22 N. Y. 402, the insurer issuing the subsequent policy waived the forfeiture and paid the loss under the policy. In Mitchell v. Lycoming Ins. Co., 51 Pa. St. 402, it was held by Agnew, J.: "If they were void at the time of the loss, they constituted no obstacle; but if they were voidable only by reason of some breach of condition enabling the insurer to avoid them, but which they had waived, the overinsurance doubtless exists." In a case in Indiana (American Ins. Co. v. Replogel, 114 Ind. 1) it was held that if in any case the insured accepted the subsequent policy as a valid subsisting contract, and extrinsic facts were necessary in order to show that the second policy was invalid, then the condition of the

policy are released.[88] The cases, however, support the rule that the insurers are not released unless the insurer in the subsequent policy waives the condition as to other insurance before a loss, and becomes liable upon the policy.[89] These questions have most frequently arisen where both the prior and subsequent policies have been conditioned to be void in case of any other insurance. Where the policies both contain such a condition, the latter policy cannot be considered as operative unless the condition is waived. Can the condition in the prior policy as to other insurance be said to be violated unless the subsequent policy is a valid and enforceable contract? The subsequent policy is certainly not an enforceable contract, unless the insurer assumes the risk after knowledge of the other prior insurance. It does not seem that it could reasonably be contended that a subsequent policy containing such a condition, and which has never attached, is within the meaning of the provision as to other insurance. The latter policy is inoperative, unless it is ratified and confirmed by the insurers with knowledge of the facts rendering it invalid. The better reasoning supported by the weight of authority is that the other insurance must be a valid contract, legally enforceable against the insurers, in order to avoid the prior policy. If the risk has been so increased by an alteration or change in the occupation of the premises as to avoid a policy, and the company refuses to assume the risk as changed, a subsequent insurer cannot set up such prior policy in defense to an action on the subsequent policy which contains a condition as to other insurance.[90]

prior policy as to other insurance had been violated. In a case in Kentucky (Stevenson v. Phœnix Ins. Co., 83 Ky. 7; 4 Am. St. Rep. 120) it has been held that the prior policy forbidding other insurance is avoided, even though the subsequent policy is void upon its face.

[88] Phœnix Ins. Co. v. Copeland (Ala.) 8 S. Rep. 48; David v. Hartford F. Ins. Co., 13 Iowa, 69; Mitchell v. Lycoming Ins. Co., 51 Pa. St. 402.

[89] Hardy v. Union Ins. Co., 4 Allen (Mass.), 217; Thomas v. Builders' F. Ins. Co., 119 Mass. 121; 20 Am. Rep. 317; Hale v. Union Ins. Co., 32 N. H. 299; Knight v. Eureka Ins. Co., 26 Ohio St. 664; 20 Am. Rep. 778; Mitchell v. Lycoming F. Ins. Co., 51 Pa. St. 402.

[90] Leilandt etc. Co. v. Firemen's Ins. Co., 35 Fed. Rep. 30.

§ 2476. **Effect of Interim Receipts.**—If a valid contract of insurance or to insure be effected, and in evidence of such contract an interim receipt is given, this will be sufficient to constitute a violation of the condition in the policy as to other insurance.[91]

§ 2477. **Where Subsequent Voidable Policy is Treated as Valid after a Loss.**—If the condition in a subsequent policy of insurance as to other insurance is waived by the insurer before a loss occurs, and the policy becomes a valid enforceable policy, there is no doubt but that the prior policy would be avoided where it is conditioned to be void in case of other insurance. The question as to whether the prior policy would be avoided where the validity of the subsequent policy is not waived until after a loss has been many times discussed. There is a large class of cases in which it is held, and in fact the majority of the courts before which the question has come have held, that where the subsequent policy is valid on its face, or for any reason has been attached up to the time of the loss, then the prior policy is not avoided, though the insured may have received payment of the second policy from the insurer.[92] The rights of the parties become fixed from the time of the loss. If the subsequent policy is not a valid policy at that time, then the liability of the insurer under the prior policy has become fixed, and the insurer is indebted to the insured to the extent of the loss up to the amount of the policy. If the insurer who issues the subsequent policy waives its invalidity after the loss, such waiver can in no way affect the rights of the parties under the prior contract, since a payment under the subsequent policy will be considered as a gratuity. In such a case the insured is not estopped from showing

[91] Hatton v. Beacon Ins. Co., 16 U. C. Q. B. 316; Mason v. Andes Ins. Co., 23 U. C. C. P. 37.

[92] Philbrook v. New England Ins. Co., 37 Me. 137; Lindley v. Union Ins. Co., 65 Me. 368; Hardy v. Union Ins. Co., 4 Allen (Mass.), 217; Clark v. New England Ins. Co., 6 Cush. (Mass.) 342; Jackson v. Massachusetts M. F. Ins. Co., 23 Pick. (Mass.) 418; Thomas v. Builders' F. Ins. Co., 119 Mass. 121; 20 Am. Rep. 317; Gale v. Belknap Ins. Co., 41 N. H. 170; Schenck v. Mercer Co. Mut. Ins. Co., 4 Zab. (N. J.) 447; Stacey v. Franklin Ins. Co., 2 Watts & S. (Pa.) 506.

that at the time of the loss there was no valid enforceable contract existing other than the policy first issued. If the insured had received a gift from some third person immediately after a loss, could it be reasonably contended that the insurer in a prior policy could defeat a recovery on that ground? And yet is it not substantially and in fact a gift where the insurers who have issued a subsequent policy make a payment to the insured of the amount of his loss, when in fact the policy is invalid and inoperative and cannot be enforced, and is in no way binding upon them? These cases are in accord and in the same line with the principles stated in the preceding section as sustained by the weight of authority. The rule could not, consistently with principle, be otherwise. It has been held, however, that in such a case the prior policy is avoided,[93] but the weight of authority supports the contrary view, as we have stated.

§ 2478. Prohibition against Other Insurance, Whether "Valid or Invalid."—In many policies the words "valid or invalid" have been added to the clause against additional insurance in order to eliminate the question as to the effect of other insurance which is void or voidable. The courts, however, are not in harmony in their decisions as to the construction of this clause, though it has generally been sustained as valid and binding.[94] In Phoenix Insurance Company v. Lamar[95] it was held that where an insurance policy is conditioned to be void in case of "any other insurance" without consent, "whether valid or not," another policy in and of itself invalid and void, so that it constitutes no contract of insurance, is not within the prohibition, but if to avoid it requires the production of extraneous facts, it is within the prohibition. And in an Iowa case[96] it was held that where a

[93] David v. Hartford Ins. Co., 13 Iowa, 69; Bigler v. New York Cent. Ins. Co., 22 N. Y. 402.

[94] Phœnix Ins. Co. v. Copeland, 90 Ala. 386; Allen v. Merchants' Ins. Co., 30 La. Ann. 1386; 31 Am. Rep. 243; Bigler v. New York Cent. Ins. Co., 22 N. Y. 402; Suggs v. Hartford F. Ins. Co., 98 N. C. 143; 3 S. E. Rep. 732; Continental Ins. Co. v. Heilman, 9 Ins. L. J. 91.

[95] 106 Ind. 513; 55 Am. Rep. 764.

[96] Stevens v. Citizens' Ins. Co., 69 Iowa, 658.

prior policy had become void by the removal of the property insured, so that it had been taken out of the operation of that policy, one issued subsequent to the avoidance of the prior policy, and which was conditioned to be void by other insurance, whether "valid or invalid," was not avoided by the prior policy. In New Hampshire, it has been held that such a condition is not a valid one, since a void contract, which is regarded by law as a mere nullity, can in no way affect rights obtained under an existing contract.[97] The question has also arisen where these words are added as to whether the prior or subsequent policy is avoided where the conditions are the same or similar in each. In Michigan, it has been held that the subsequent policy is void,[98] while in North Carolina it has been held that the prior policy is void.[99]

§ **2479. Renewals of Prior Policies.**—A policy of insurance which provides that it shall be void in case of other insurance is not avoided by the renewal of a policy existing at the time the policy containing the provision was effected, and which was mentioned in the application for that policy.[100] But if the insured mentions the prior insurance in his application for a policy, and states that it will not be renewed, a renewal of such prior policy will constitute a violation of the condition as to other insurance.[101] If the insured, instead of renewing the policy in the same company, takes out a policy for the same amount in another company, it is held to be a violation of the condition.[102] In a case in New Hampshire, however,[103] it was held that where the charter of a mutual company did not require the name of the company in which the other insurance was effected nor the terms of the policy to be given, but simply the amount of the other insurance to be stated

[97] Gee v. Cheshire Ins. Co., 55 N. H. 65; 20 Am. Rep. 171.

[98] Keyser v. Hartford Ins. Co., 66 Mich. 664; 33 N. W. Rep. 756.

[99] Suggs v. Hartford Ins. Co., 98 N. C. 143; 3 S. E. Rep. 732.

[100] Brown v. Cattaraugus Co. Mut. Co., 18 N. Y. 385; First Baptist Soc. v. Hillsborough M. F. Ins. Co., 19 N. H. 580.

[101] Dietz v. Mound City etc. Co., 38 Mo. 85.

[102] Healy v. Imperial Ins. Co., 5 Nev. 268; Burt v. People's Mut. Ins. Co., 2 Gray (Mass.), 397.

[103] First Baptist Soc. v. Hillsborough M. F. Ins. Co., 19 N. H. 580.

to which the company had duly assented, that the assured might renew that policy in the same company, or transfer it to another for the same amount without giving any further notice. If the condition in a policy expressly refers only to other subsequent insurance, or is construed as only referring to subsequent insurance, then the renewal of a prior policy would probably not avoid the policy containing such a condition.[104] Where an insurance company renews a policy with the knowledge of the existence of other insurance contrary to its provisions, it is estopped to afterward claim that this renewal is inoperative or the policy void by reason of the existence of such other insurance.[105]

§ 2480. Where Policies are Simultaneous—Concurrent Insurance—Fire Risks.—If policies are issued by different companies through different agents to the same assured, though the risk insured against is to commence at the same moment, it will not be presumed that the policies are simultaneous.[106] In the absence of proof to the contrary, the necessary presumption of both law and fact is that one of the policies was antecedent to the other, and consequently the companies are entitled to the usual notice in respect to prior and additional insurance.[107] Where, however, they are issued by the same agent, and may be presumed to be simultaneous, notice is not necessary.[108] Under the code provision of California[109] if two or more policies bear date from the same day, they are deemed to be simultaneous, and the liability of insurers on simultaneous policies is to contribute ratably with each other. If two companies co-operate in assuming a risk where the applicant has only applied to one, and two policies are issued, similar in all respects, simultaneously, neither pol-

[104] Pitney v. Glen's Falls Ins. Co., 65 N. Y. 1.

[105] Carroll v. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402; 40 Barb. (N. Y.) 292. That renewal is not "other" insurance under a clause providing for notice of other insurance, see Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.

[106] Manhattan Ins. Co. v. Stein, 5 Bush (Ky.), 652.

[107] Manhattan Ins. Co. v. Stein, 5 Bush (Ky.), 652.

[108] Farmers' Ins. Co. v. Taylor, 73 Pa. St. 342.

[109] Deering's Annot. Civ. Code Cal., sec. 2642.

icy will constitute other insurance in violation of the conditions in each as to the policy being void in case of other insurance.[110] It is held that a condition of a fire policy limiting and requiring consent to concurrent insurance is not violated by the cancellation of a concurrent policy subsequent to the issuance of the policy in question, and the issuance by another company of a new policy for the exact amount of the canceled policy making the total insurance the same as when the policy was issued.[111] In construing the meaning of the word "concurrent" in connection with insurance contracts the court, in East Texas Fire Insurance Company v. Blum,[112] said: "To be concurrent, the insurance must operate at the same time upon the same property, and look to the indemnity of the insured in case of its loss or destruction from a casualty insured against."

§ 2481. Rule where Marine Policies of Same Date are Issued—Priority in Date may be Shown.—If two or more marine policies are issued upon the same property and risk, and have the same date, there arises a presumption that they are simultaneous. This presumption, however, is by no means conclusive, and the actual time of the execution of each policy may be shown.[113] In a federal case two policies were executed, bearing the same date, and upon this point Story, J., said: "The law, when it is material, will examine into fractions of a day, and give the parties their rights accordingly. In this case, therefore, I shall admit the evidence of the actual time of the execution of the two policies."[114] If in such a case it be shown that one of the policies was in fact executed prior to the other, then if the prior policy covers the whole interest the underwriters under that policy must alone bear the whole loss, where the subsequent policy provides

[110] Washington Ins. Co. v. Davidson, 30 Md. 91.

[111] New Orleans Ins. Assn. v. Holdberg, 64 Miss. 51.

[112] 76 Tex. 653; 13 S. W. Rep. 572.

[113] Potter v. Marine Ins. Co., 2 Mason (C. C.), 475; Lee v. Massachusetts Ins. Co., 6 Mass. 208.

[114] Preceding note. See, also, Brown v. Hartford Ins. Co., 3 Day (Conn.), 58.

that the underwriters of that policy shall be liable only for as much interest as is uncovered by the prior policy.[115] If, however, the two policies were in fact executed at the same time, or the proof is not strong enough to overcome the presumption that they were so executed, then the priority clause is excluded, and the assured may, in an action upon either policy, recover the full amount of his loss on that policy. In such a case the other underwriters will be liable for contribution. The question as to whether other policies are prior in date should not be determined by the date of the attaching of the policies; the clause refers to priority in date of effecting the insurance.[116]

§ 2482. Provisions in Charter or By-laws as to Other Insurance.—If a policy issued by a mutual company refers to the charter and by-laws of the company, and makes them a part of the policy, then any provisions therein as to other insurance must be strictly complied with by the insured, and any violation of such provisions will avoid the policy.[117] A provision in the charter prescribing the manner and form of contract by the company must be complied with, and cannot, it is held, be waived.[118] Chief Justice Marshall says:[119] "The act of incorporation is an enabling act; it gives the corporation all the powers it possesses; it enables it to contract, and when it prescribes to it a form of contracting it must observe that mode, for the instrument no more creates a contract than if the body had never been incorporated." Consequently, if the charter of a company provides that the policy shall be void in case of other insurance unless assent has been given thereto and indorsed upon the policy, this provision must

[115] Potter v. Marine Ins. Co., 2 Mason (C. C.), 475.

[116] Lee v. Massachusetts Ins. Co., 6 Mass. 208; Deming v. Merchants' etc. Co., 90 Tenn. 306; 17 S. W. Rep. 89; 13 L. R. Annot. 518.

[117] Burt v. People's M. F. Ins. Co., 2 Gray (Mass.), 397; Security Ins. Co. v. Fay, 22 Mich. 467; McMahon v. Portsmouth Ins. Co., 22 N. H. (2 Fost.) 15; Blanchard v. Atlantic Ins. Co., 33 N. H. 9; Fabyan v. American F. Ins. Co., 33 N. H. 203.

[118] Couch v. City F. Ins. Co. of Hartford, 38 Conn. 181; Stark etc. Ins. Co. v. Hurd, 19 Ohio, 149.

[119] Head v. Providence Ins. Co., 2 Cranch (U. S.), 127.

be complied with. The object of the provision is to prevent the insuring of the property in different companies, and to protect other policy-holders and the public in general. The legislature in inserting the clause is presumed to have intended to place it beyond the power of the company to enter into any contract of insurance which should be enforceable unless these provisions in the charter as to other insurance should be complied with.[120] The words of a provision in a charter are not, however, in all cases to receive an absolutely literal construction, though they are to be strictly construed. Thus, where the charter provided that the consent to other insurance should be given by "indorsement on the back of the policy," it was held that a recital in the body of the policy of the other insurance was a substantial compliance with the provision.[121] In those cases where the by-laws or the charter contains such a provision, the courts have also held that the provision cannot be waived by an agent or any officer of the company.[122] Though it is held that charter provisions requiring certain things to be done in order to render a contract valid cannot be waived, yet it would seem that there might be a distinction where the provisions are only contained in the by-laws, and that while the charter provisions of this nature cannot be

[120] Where there is a provision in the charter of a mutual company that the policy shall be void in case of other insurance unless consent has been given by the directors and indorsed by the president and secretary upon the policy, it cannot be waived, since it is considered as going to the essence of the contract, and consent can only be proved in the manner prescribed in the charter. In this connection the words of the court in Leonard v. American Ins. Co., 97 Ind. 299, are pertinent: "Whenever the charter of an insurance company requires that any act shall be done, and declares that if the act be not done in the manner prescribed the contract or policy of insurance shall be void, the company cannot waive the performance of such act in the prescribed mode; for performance of any condition of the contract fixed by law cannot be waived. This has been repeatedly declared to be the law in cases involving the question of double insurance."

[121] First Baptist Soc. v. Hillsborough Mut. Ins. Co., 19 N. H. 580.

[122] Forbes v. Agawam Ins. Co., 9 Cush. (Mass.) 470; Worcester Bank v. Hartford F. Ins. Co., 11 Cush. (Mass.) 265; Simpson v. Pennsylvania Ins. Co., 38 Pa. St. 280; Hale v. Mechanics' M. F. Ins. Co., 6 Gray (Mass.), 169; 66 Am. Dec. 410.

waived, provisions in the by-laws might.[123] A provision in the by-laws that "persons insuring with this company may insure with other companies, with the consent of the directors indorsed on the policy," the provision, being made a part of the policy, has been construed as being an implied prohibition against other insurance.[124] The rules above given should be considered, however, in connection with what has been said elsewhere concerning the powers of corporations,[125] and of agents.[125a]

§ 2483. Notice of Other Insurance—What is Sufficient.—If a fire policy contains a condition that in case of "any other insurance" the insured must give notice to the company, such a condition applies to both subsequent and prior insurance.[126] But if the insurance requires "notices of all previous insurances," it will not be construed as extending to subsequent insurances also.[127] The provision requiring notice of all additional insurance in behalf of the insured refers only to additional insurance upon the same property.[128] Notice of prior insurance may be established by parol where the policy does not require it to be in writing, though it prescribes that the assent of the company be in writing.[129] Where a parol contract of insurance is entered into, a verbal notice is all that is necessary in case of other insurance, though the usual form of policies may require notice to be indorsed on the policy or otherwise acknowledged in writing.[130] The in-

[123] See Redstroke v. Cumberland M. F. Ins. Co., 44 N. J. L. 294. See sec. 526, herein.

[124] Hygum v. Ætna Ins. Co., 11 Iowa, 21.

[125] See secs. 34-36, 332-34, herein.

[125a] See secs. 434-439 and c. xx, herein.

[126] Frederick etc. Ins. Co. v. De Ford, 38 Ind. 404; Warwick v. Monmouth Co. Mut. F. Ins. Co., 15 Vroom (N. J.), 83; 43 Am. Rep. 343.

[127] Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 12 Wend. (N. Y.) 507.

[128] Franklin etc. Ins. Co. v. Updegraff, 43 Pa. St. 350.

[129] Kenton Ins. Co. v. Shea, 6 Bush (Ky.), 174; 99 Am. Dec. 676. See, also, McEwen v. Montgomery Ins. Co., 5 Hill (N. Y.), 101; Sexton v. Montgomery Ins. Co., 9 Barb. (N. Y.) 191; Schenck v. Mercer Co. Ins. Co., 24 N. J. L. 447; Planters' Mut. Ins. Co. v. Lyons, 33 Tex. 253; Hendrickson v. Queen's Ins. Co., 31 U. C. Q. B. 547.

[130] Eureka Ins. Co. v. Robinson, 56 Pa. St. 256; 94 Am. Dec. 65.

sured should, in all cases where he has procured other insurance which his policy stipulates against, exercise reasonable diligence in giving notice of the same, and whether he has so exercised it is a question for the jury.[131] Where the policy provided that notice must be given of "all additional insurance and of all changes that may be made in such additional insurance," and the insured gave notice of other insurance, but upon renewing such other insurance had the amount differently distributed, it was held that a failure to give notice of such change in distribution would release the insurers.[132] While in all cases knowledge of further insurance may not be equivalent to notice to the original company, yet knowledge followed by acts that amount to a subsequent recognition of the original contract as still in force will dispense with the necessity of proving notice.[133]

§ 2484. Permission to Obtain Other Insurance.—In many cases policies are issued which contain a clause permitting other insurance to a certain specified amount, or subsequent to their issuance permission is indorsed for further insurance, the policy also permitting such other insurance. This will be construed to be a consent to insurance in other companies to the amount named, and the condition will not be violated by a renewal of the policies of other insurance upon their expiration.[134] A permission of this nature is held to refer to both subsequent and prior insurance, and to include the aggregate amount of both.[135] If the policy permits other insurance to a certain amount, any insurance beyond that amount will avoid the policy where it is conditioned to be void in case of other insurance without notice and consent. It is the same as if the policy were conditioned to be void in case

[131] Kimball v. Howard Ins. Co., 8 Gray (Mass.), 33; Mellen v. Hamilton F. Ins. Co., 17 N. Y. 609.

[132] Simpson v. Pennsylvania Ins. Co., 38 Pa. St. 250.

[133] Eureka Ins. Co. v. Robinson, 56 Pa. St. 256; 94 Am. Dec. 65.

[134] Parsons v. Stoddard F. Ins. Co., 3 Leg. News (Montr.), 335.

[135] Carruge v. Atlantic Ins. Co., 40 Ga. 135; Blake v. Exchange Ins. Co., 12 Gray (Mass.), 265; Kimball v. Howard Ins. Co., 8 Gray (Mass.), 33; Warner v. Peoria Ins. Co., 14 Wis. 318.

other insurance should be effected beyond the amount specified.[136] Where the following clauses were indorsed upon the policy, "Other insurance permitted concurrent in form herewith," and "Loss, if any, payable to T., executor, to the extent of his mortgage interest," and subsequently other insurance was obtained, but it was not concurrent in form, it was held, the company having claimed that the policy was forfeited, that the indorsements upon the policy were not a part of the same, and that it was not necessary that the provisions in the other policies should be concurrent in form.[137] When partial insurance is taken on property, other insurance being permitted, the company assumes the risk not on any definable portion of the property, but on an undivided proportion of the whole property.[138]

§ 2485. Consent to Other Insurance—Indorsement on Policy.—In connection with the provision as to notice there is generally the requirement of an indorsement to assent to other insurance upon the policy. Thre are a few cases which hold that there must be a strict compliance with this provision, as it is a condition precedent to recovery, and that verbal notice without a written indorsement is not sufficient.[139] Thus, it has been held that a letter expressing willingness to give consent to the insured's taking out additional insurance does not satisfy a condition in a policy that if the insured takes out other insurance without obtaining a consent of the company indorsed on the policy the policy shall be void.[140] If the charter of a mutual company contains a provision requir-

[136] Allen v. German-American Ins. Co., 123 N. Y. 6; 25 N. E. Rep. 309; Blake v. Exchange Ins. Co., 12 Gray (Mass.), 265; Elliott v. Lycoming Ins. Co., 66 Pa. St. 22.

[137] Caraher v. Royal Ins. Co. etc. (N. Y. S. C. 1892), 17 N. Y. Supp. 858; 44 N. Y. St. Rep. 141.

[138] Teague v. Germania F. Ins. Co., 71 Ala. 473.

[139] Myers v. Germania Ins. Co., 27 La. Ann. 63; Hutchinson v. Western Ins. Co., 21 Mo. 97; 64 Am. Dec. 218; Gilbert v. Phœnix Ins. Co., 36 Barb. (N. Y.) 372; Fellows v. Madison Ins. Co., 2 Disn. (Ohio) 128; Simpson v. Pennsylvania Ins. Co., 38 Pa. St. 256; Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495.

[140] Allemania F. Ins. Co. v. Hurd, 37 Mich. 11.

ing indorsement as necessary to the continued validity of the policy,[140a] it would be necessary to comply with this provision, but if it is simply a provision of the policy, it would seem that the requirement as to the indorsement might be waived by the company and its agents the same as any condition avoiding the policy. The later cases, and in fact the weight of authority, may be said to support this proposition.[141] Consequently, a strict compliance with the provisions is not in all cases necessary, and there are many instances in which a notice of other insurance will be sufficient to preserve the policy. And though the policy may require the consent to be indorsed thereon, yet it has been held that a consent in writing to the other insurance will be sufficient though not indorsed as required.[142] The granting by the insurer of the required consent for the procuring of another policy will extend to the renewal of that policy.[143] Where the policy provides that it shall be void in case of other insurance without notice and consent of the company, other insurance without such notice or consent will, in the absence of a waiver of the provision, avoid the policy.[144] Where a contract for present insurance and for a policy on the same risk is made subject to the conditions contained in the printed policy of the insurer, a condition in the printed policy that all additional insurance, whether prior or subsequent, shall be mentioned in or indorsed on the policy does not require that either prior or subsequent insurance should be mentioned or indorsed on the contract.[145] If the policy is silent as to where or by whom the consent shall be indorsed, the attachment of a printed slip used for that purpose, signed by an agent of the company, will be sufficient.[146]

[140a] See secs. 34-36, 332-334, 434-439, and c. xx, herein.

[141] See sec. 2487, herein.

[142] Maddox v. Des Moines Ins. Co., 74 Iowa, 233. See National Ins. Co. v. Crane, 16 Mo. 260; 77 Am. Dec. 289; Kenton Ins. Co. v. Sheer, 6 Bush (Ky.), 174; 9 Am. Dec. 676.

[143] New Orleans Ins. Co. v. Holdberg, 64 Miss. 51.

[144] Ben Franklin Ins. Co. v. Neary, 4 Ill. App. 74; Johnson v. American Ins. Co., 41 Minn. 396; 43 N. W. Rep. 59.

[145] Dayton Ins. Co. v. Kelly, 24 Ohio St. 345; 15 Am. Rep. 612.

[146] Grubbs v. Virginia F. & M. Ins. Co., 110 N. C. 108; 14 S. E. Rep. (1892) 516.

§ 2486. Return of Premium in Case of Refusal to Indorse Consent to Other Insurance.—If the policy provides that it shall be void, in case of other insurance upon the property, unless notice has been given and the company's consent indorsed upon the policy, the company cannot, in case of its refusal to indorse consent, be compelled to return the premium for the remainder of the term which the policy would have had to run,[147] unless the policy provides that the insured may cancel upon returning the premium for the unexpired term. In such case the insurer must either cancel the policy and return the premium, or else the policy will continue in full force and effect.[148]

§ 2487. Waiver of Provisions as to Other Insurance—Notice—Consent—Indorsement on Policy.—A violation of the provisions of the policy as to other insurance will avoid the policy where it is so conditioned, unless there has been a waiver of such provision. Though the courts were at first inclined to require a strict compliance with the provisions as to notice and consent to other insurance when required to be in writing, the weight of authority clearly sustains the rule that a strict compliance is not necessary, and the provisions may be waived by the company,[149] and in many instances by the agents of the company.[150] But in order to establish a waiver of a condition against additional insurance, it must appear that the subject matter of the waiver and consent was in the minds of the parties, and that it was consciously and purposely done by the minds of the parties coming together upon the proposition.[151] The fact that the company has actual

[147] Phœnix Ins. Co. v. Stevenson, 78 Ky. 150; Johnson v. American Ins. Co., 41 Minn. 396; 43 N. W. Rep. 59.

[148] Daniel v. Hartford F. Ins. Co., 4 Allen (N. B.), 341.

[149] See Carrusie v. Atlantic Ins. Co., 40 Ga. 135; Pitney v. Glen's Falls Ins. Co., 65 N. Y. 1; Kenton Ins. Co. v. Shea, 6 Bush (Ky.), 174; 99 Am. Dec. 676; Howitt v. Equitable Ins. Co., 40 Mo. 557; 93 Am. Dec. 321; Bigler v. New York Ins. Co., 22 N. Y. 402, and other cases under this section.

[150] See secs. 556-58, herein.

[151] Hartford F. Ins. Co. v. Small, 14 U. S. C. C. A. 33, 35, per Bruce, D. J.; 66 Fed. Rep. 490.

knowledge of the other insurance at the time of issuing the policy, though no formal notice has been given, will prevent it from setting up additional insurance to defeat a recovery.[152] A forfeiture of a policy, by taking additional insurance in violation of its conditions, may be waived by the company when, with knowledge of the forfeiture and supposing it to be waived, it fails to notify the insured of its intention to insist on the forfeiture until after its adjuster has visited the insured and obtained from him all the information asked for in relation to the extent and value of his loss. Such action by the company will warrant the jury in finding a waiver of the forfeiture, and that question should be submitted to it.[153] The mere fact, however, that insurance adjusters report the total amount of insurance and the proportionate share of the loss to be paid by each of several companies interested is not of itself a waiver by a company not represented by them of a condition in the policy of such company limiting the amount of insurance, but if such company receives such report showing overinsurance, and that it is expected to pay its proportionate share of the adjusted loss, and retains such report without objection, it thereby waives the protection of the condition limiting the amount of insurance to be carried.[154] Where a policy of insurance against fire was conditioned to be void in case other insurance should be made without the insurer's consent, and the loss having occurred, the insurer, with knowledge that other insurance had been made contrary to the terms of the policy, called upon the insured for further proofs of loss without insisting upon the forfeiture, and the proofs were made, it was held that the forfeiture was waived.[155] So the company may waive its right to insist upon the forfeiture provided for by inducing by its silence the insured to believe that no objection

[152] Richardson v. Westchester F. Ins. Co., 15 Hun (N. Y.), 472; Whithed v. Germania Ins. Co., 76 N. Y. 415; Eureka Ins. Co. v. Robinson, 56 Pa. St. 256; 94 Am. Dec. 65.

[153] Cleaver v. Traders' Ins. Co., 71 Mich. 414; 15 Am. St. Rep. 275.

[154] Everett v. London etc. Ins. Co., 142 Pa. St. 332; 24 Am. St. Rep. 499. But see Phœnix Ins. Co. v. Stevenson, 78 Ky. 150; Jewett v. Home Ins. Co., 29 Iowa, 562.

[155] Webster v. Phœnix Ins. Co., 36 Wis. 67; 17 Am. Rep. 479.

would be made,[156] and it has been held that it is the duty of the insurer, upon being notified of other insurance, to either indorse consent or notify the insured of its refusal to carry the risk, and that a failure to do so will estop the company from setting up in defense the fact that consent was not indorsed.[157] If the application states that there is "no other insurance in this company," and said policy, as well as a prior one, is issued by the same insurer, and both applications are taken by the same agent, and the company acts on both applications, receives the premiums, and issues both policies, it cannot be heard to question the validity of either.[158] But if the assured obtains other insurance of one of the members of a firm of agents who had issued the first policy, this does not constitute consent to other insurance, even though assured does not know of the fact of dissolution, nor that the agency had terminated for the first company.[159]

§ 2488. Insurer is Chargeable with Knowledge of Prior Policies Issued by It.—A company is chargeable with knowledge of the existence of other prior policies issued by it.[160] Where both policies were issued by the same company, and the prior policy was conditioned to be void in case of other insurance, it was held that the prior policy was avoided by the subsequent one.[161] And in New York it has been held that if an agent knows of a prior insurance, which he mistakenly believes to have expired, and, acting under such belief, procures a second policy on the same property which contains a condition that it shall be void if the insured "shall have any

[156] Clinton Ins. Co. v. Griffin, 59 Tex. 509.

[157] Planters' Mut. Ins. Co. v. Lyons, 38 Tex. 353. See, also, Phœnix Ins. Co. v. Spiers, 87 Ky. 285; 8 S. W. Rep. (1888) 453; Pilkington v. Knapp Ins. Co., 65 Mo. 172; Potter v. Insurance Co., 5 Hill (N. Y.), 147; Westlake v. St. Lawrence Ins. Co., 14 Barb. (N. Y.) 206. But see Johnson v. American Ins. Co., 43 N. W. Rep. 59.

[158] Emlaw v. Travelers' Ins. Co. (Mich. 1896), 66 N. W. Rep. 469. See Copeland v. Insurance Co., 77 Mich. 554; 43 N. W. Rep. 991.

[159] Greenwich F. Ins. Co. v. Sabotnick, 91 Ga. 717; 17 S. E. Rep. 1026.

[160] Lanagan v. Providential Ins. Co. (N. Y. S. C. 1892), 44 N. Y. St. Rep. 234; 18 N. Y. Supp. 287.

[161] Ducler v. Citizens' etc. Ins. Co., 23 La. Ann. 332.

insurance on the property hereby insured, not indorsed, known, or consented to by this company or its authorized agent in writing, this policy shall be void," this pre-existing policy is a breach of the condition, and avoids the second policy.[162]

§ 2489. Recovery — Prior Policies — Marine Insurance — Contribution — Where no Pro Rata Clause.—If several policies of marine insurance are issued upon the same property and risk, and contain no clause as to apportionment of the liability of the insurers, the rule in England and the common-law rule in the United States is, that the insured may recover a proportionate part of the loss from each of the insurers, or he may recover the entire amount from any one of the insurers, and the insurer may demand contribution from the others. Where several policies are issued by different insurers upon the same property, they are, as between themselves, sureties.[163]

[162] Sanders v. Cooper, 115 N. Y. 279; 12 Am. St. Rep. 801.

[163] Davis v. Gildart, 1 Marshall on Insurance, ed. 1810, 148; Godin v London Assur. Co. (1758), 1 Burr. 489; 1 W. Black. 103; Clark v. Western Assur. Co., 29 Week. L. C. 237; Newly v. Reed, 1 W. Black, 416; Thurston v. Koch, 4 Dall. (U. S.) 348; Millaudon v. Western Mut. Ins. Co., 9 La. 27; 29 Am. Dec. 433; Wiggin v. Suffolk Ins. Co., 18 Pick. (Mass.) 145; 29 Am. Dec. 576; Lucas v. Jefferson Ins. Co., 6 Cow. (N. Y.) 635; Howard Ins. Co. v. Scribner, 5 Hill (N. Y.), 298; Peters v. Delaware Ins. Co., 5 Serg. & R. (Pa.) 473, per Duncan, J. In this case, however, the court held upon the facts that the case was one of double insurance, and that the insured should not recover from the second insurer where he could recover against the first, unless plaintiff could show that in the event which had happened the defendants were liable, and not the other insurance company whose policy was of prior date: Sloat v. Royal Ins. Co., 49 Pa. St. 14; Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28. This was first settled in the case of Davis v. Gildart, 1 Marshall on Insurance, ed. 1810, 148. In that case Lord Mansfield said: "The question seems to be whether the insured has not two securities for the loss which has happened. If so, there can be no doubt that he may bring an action against either. It is like the case of the two sureties where if all the money be recovered from one of them he may recover a portion from the other." And in the later case of Godin v. London Assur. Co., 1 Burr. 489, 1 W. Black. 103, Lord Mansfield again said: "As between the insurer and the insured, upon the foot of commutative justice merely, the insurers were bound to pay the insured the whole, for they have received a premium for

§ 2490. To Enforce Contribution Policies Must Cover Same Interest in Same Property.—Contribution cannot be enforced unless the policies cover the same interest in the same property.[164] Thus, where the consignee had insured goods of the consignor in pursuance of a contract with the consignor to keep his goods insured, it was held that the insurer under the policy could not claim contribution from other companies which had issued policies upon goods in the same warehouse belonging to other consignees.[165] But where warehousemen insured "merchandise" in their warehouses "their own or held by them in trust, or in which they have an interest or liability," and depositors of the merchandise, to whom advances had been made by the warehousemen, took out other policies upon the same goods for their own protection and that of the warehousemen, it was held to constitute double insurance, and to render the insurers liable to bear the loss proportionately.[166] In case of a policy issued upon the mortgagor's

the whole risk. If the insured be to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro rata to satisfy that loss against which they have insured . . . . and if the whole should be recovered from one, he ought to stand in the place of the insured to receive contribution from the other, who was equally liable to pay the whole." In Thurston v. Koch, 4 Dall. (U. S.) 348, this last cited case and the rule stated therein was approved and adopted. The court said: "Such being the law of England as to double insurances before and at the commencement of our regulation, which divides the loss ratably among the insurers. It was also the law of this country, and is so now. It is of authoritative face, and must govern the present case. Besides, if the court were at liberty to elect a rule, I should adopt the English regulation, which divides the loss ratably among the insurers. It is the most convenient, equal, and consonant to natural justice, and has been practiced upon nearly half a century by the first commercial nation in the world." This case contains a review of all the prior decisions involving this point, and also a thorough and lengthy discussion of the principles involved.

[164] Fox. v. Phœnix Ins. Co., 52 Me. 333; Liverpool etc. Ins. Co. v. Verdier, 33 Mich. 138; Tuck v. Hartford F. Ins. Co., 56 N. H. 326; Adams v. Greenwich Ins. Co., 9 Hun (N. Y.), 45; 70 N. Y. 166; Hastings v. Westchester F. Ins. Co., 73 N. Y. 141; Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 30 Am. Dec. 90.

[165] Lowell Mfg. Co. v. Safeguard F. Ins. Co., 88 N. Y. 591.

[166] Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. (3 Otto) 527. See, also, Robbins v. Firemen's Fund Ins. Co., 16 Blatchf. (C. C.) 122.

interest and of another policy by a different company upon the mortgagees, the fact that the mortgagor had, after payment of the loss to the mortgagee, compelled the latter to account to him as trustee ex maleficio will not permit the company which insured the equity of redemption to enforce contribution against the other insurer, since there is no double insurance.[167]

§ 2491. Rules as to Recovery and Contribution in Fire Insurance where there are Several Policies constituting Other Insurance.—In the absence of any provisions in fire policies covering the same property, and issued by different companies, as to liability in case of other insurance, the rule which we have stated in a preceding section as applicable to marine policies under similar conditions will control.[168] The insured can in no case recover more than the amount of loss which it has been proved that he has sustained, and if, where there are several policies upon the property, he has recovered the amount of that loss upon a part of the policies, the liability of the remaining insurers to him has ceased, and they are only liable for contribution to those who have paid.[169] Where three companies insured goods in every part of a building, and one of them made a further insurance of goods in the upper stories only, and a loss occurred which in the lower stories exceeded the amount of the first insurance, and in the upper stories exceeded the amount of the second insurance, it was held that the second insurance was payable in full, and that the first policies did not contribute to it.[170] Where one has insurance in two companies but there is a

[167] Niagara F. Ins. Co. v. Scammon, 35 Ill. App. 582; 28 N. E. Rep. 919.

[168] Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. (3 Otto) 527; Barnes v. Hartford F. Ins. Co., 3 McCrary (C. C.), 226; Williamsburg City F. Ins. Co. v. Gwinn, 88 Ga. 65; 13 S. E. Rep. 837; Peoria F. & M. Ins. Co., 18 Ill. 553; Keller v. Merchants' Ins. Co., 7 La. Ann. 29; Baltimore etc. Ins. Co. v. Loney, 20 Md. 20; Wiggins v. Suffolk Ins. Co., 18 Pick. (Mass.) 145; Howard Ins. Co. v. Scribner, 5 Hill (N. Y.), 298; Royal Ins. Co. v. Roedel, 78 Pa. St. 22; Sloat v. Royal Ins. Co., 49 Pa. St. 4; Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28.

[169] Williamsburg City F. Ins. Co. v. Gwinn, 88 Ga. 65; 13 S. E. Rep. 837. See, also, cases cited in preceding note.

[170] Royal Ins. Co. v. Roedel, 78 Pa. St. 19; 21 Am. Rep. 1.

doubt about his ability to recover from either, he may claim the full amount of the loss from each without being guilty of an attempt at fraud, which by the terms of one of the policies would prevent a recovery thereon.[171] An agreement by insurance agents to insure property for a certain specified amount in certain specified companies at a certain per cent is held to mean that there is to be an equal division of the risk among those companies.[172] Though the policies may provide that the insured shall in case of loss furnish a statement giving the details of the loss and the amount claimed, it is not necessary for the insured to apportion, or attempt to apportion, the loss among the different companies in the proof of loss.[173] For the purpose of apportioning the loss, in case of overinsurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first-mentioned policy is, in case of destruction of the entire property, to be distributed among the several parcels in the proportion which the sum insured by that policy bears to the total value of all the parcels.[174]

§ 2492. Rule where Fire Policy Contains Pro Rata Clause.—Most policies of fire insurance contain a clause

[171] Bennett v. Council Bluffs Ins. Co., 70 Iowa, 600.

[172] Fulton v. Phœnix Ins. Co., 25 Fed. Rep. 880. In this case the agents agreed to insure certain buildings for twelve thousand dollars at three per cent in four companies.

[173] Fuller v. Detroit F. & M. Ins. Co., 36 Fed. Rep. 469.

[174] Ogden v. East River Ins. Co., 50 N. Y. 388; 10 Am. Rep. 492. "Thus, in round numbers the sum insured in this case by the policies other than the defendant's on the property as an entirety was forty-seven thousand dollars. The total value of the property covered by these policies was eighty-eight thousand dollars. In case of a total loss each parcel should be deemed insured thereby for forty-seven eighty-eighths of the value. The parcel separately insured by the defendant was worth sixteen thousand dollars, and was insured by the defendant for three thousand dollars, which was equal to three-sixteenths of the value." See, also, Mayer v. American Ins. Co., 2 N. Y. St. Rep. 227; 49 Hun (N. Y.), 336. Under the code provisions of California (Deering's Annot. Civ. Code Cal., sec. 2642), in fire insurance each insurer must contribute ratably toward the loss without regard to the dates of the several policies.

providing that the insurer shall not be liable for any greater proportion of any loss which may occur than the amount named in the policy shall bear to the entire amount of insurance upon the property.[175] The fact that at the time a policy containing such a condition is issued there is another policy upon the property does not bind the insured to continue such other policy in force, or prevent him from canceling the same, in the absence of an express agreement that it shall be continued, and the insured may recover the full amount to the extent of the company's liability where such other policy has been canceled or has expired.[176] But if the loss does not equal the full amount of all the policies, the measure of damages against each insurer is the proportion of the loss which the amount of insurance in the policy sued upon bears to the whole insurance.[177] By inserting this clause the insurer limits the amount of recovery upon that particular policy to the proportionate amount which that policy bears to the entire amount of the policies. In the absence of such a clause the insured could recover the whole amount from any one of the insurers, and leave him to obtain contribution from the other insurers. If the policy contains a pro rata clause, "without reference to the solvency or liability of other insurers," it is held that though the other insurers become insolvent, or though the policy be avoided, yet the other insurance will be considered as reducing the liability of the company issuing the policy which contained such a condition.[178] A clause providing for a pro rata liability if there be any other insurance, "valid or invalid," does not apply where other policies are procured with-

[175] The clause in the standard form of the New York fire policy is as follows: "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by any expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers covering such property."

[176] Hand v. Williamsburgh F. Ins. Co., 57 N. Y. 41. See, also, Lattan v. Royal Ins. Co., 45 N. J. L. 453; Quarrier v. Peabody Ins. Co., 10 W. Va. 507.

[177] German Ins. Co. v. Heiduk, 30 Neb. 288; 46 N. W. Rep. 481.

[178] Cassity v. New Orleans Ins. Co., 65 Miss. 49; 3 S. Rep. 138.

out the consent or ratification of the insurer.[179] Where the policy provides that if other insurance shall be taken upon the property the company shall only be liable for its proportion of the loss, a judgment against the company for the full amount of the policy is erroneous where the pleadings show that other insurance was taken to which the company consented.[180] In determining the liability of the insurer under the provision of the policy as to pro rata liability, it is necessary to determine whether the other policies which it is claimed cover the goods do so in fact, and this must be done by construction of the other policies or otherwise, without regard to the fact that the insurers who have issued such other policies are parties or not.[181] Where by the articles of agreement of an insurance company a loss sustained by the company was "to be borne by each and every one of the several subscribers or members in proportion to the sum of money by them subscribed, it was held in case of loss they were liable in solido like an ordinary partnership, though the insured was a member of the company.[182] Where an insurance policy provides that in case of additional insurance "the insured shall not recover any greater portion of loss sustained than the amount hereby insured bears to the whole amount of the insurance," and that "the company shall only be obliged to pay as if they had insured two-thirds of the actual cash value of the said property," it was held that, in case of total loss, where the property was insured in two companies the first was not entitled to prorate with the second.[183]

§ **2493. Specific Insurance and Subsequent General Policy.**—If a general policy on goods provides that if there is any specific insurance upon the goods the insurer will only be liable for the excess of the loss insured against, over

[179] London & L. F. Ins. Co. v. Turnbull, 86 Ky. 230; 5 S. W. Rep. 542.

[180] Continental Ins. Co. v. Coons (Ky. S. C. 1892), 14 Ky. L. Rep. 110.

[181] Fire Ins. Assn. v. Merchants' & M. T. Co., 66 Md. 339; 7 Atl. Rep. 905.

[182] Shubrick v. Fisher, 2 Desaus. Eq. (S. C.) 148.

[183] Lebanon Mut. Ins. Co. v. Kepler, 100 Pa. St. 28.

and above such specific insurance, the clear intent is to throw the loss upon the specific insurance, and in such a case the insurer will only be liable on such a policy for the excess of the value of the goods lost over the amount insured by such specific insurance.[184] Where four companies insured the same property in buildings in a described inclosure, and each policy contained the following condition, "If at the happening of any fire the assured shall have insurance upon a floating policy or policies not specific, but covering goods generally in various places not designated, and yet within limits which include the property herein insured, such policy, as between the assured and this company, shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurance thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess," and other companies insured on specific property in the same inclosure, it was held that the liability of the four companies was not confined to the excess of loss above that covered by the specific insurances.[185] In case an insurance policy only covers the interest of the insured, and provides that "goods on storage must be separately and specifically insured," and they have been so insured by the depositors of the goods, the insurer will not be liable for contribution to the company which has specifically insured the property.[186]

§ 2494. Agreement between Insurers to Share Expenses of Defense Pro Rata.—An agreement between insurers to share the expenses of defense to a claim made for a loss is enforceable as between themselves, but cannot affect those to whom certain expenses of making the defense are due. Thus, where several insurers combined by such an agreement to defend a claim for a loss by fire, and hired an expert to assist them in their defense, it was held that he might recover the entire

[184] Fairchild v. Liverpool etc. Ins. Co., 51 N. Y. 65.
[185] Merrick v. Germania etc. Ins. Co., 54 Pa. St. 277.
[186] Home Ins. Co. v. Gwathney, 82 Va. 923; 1 S. E. Rep. 209.

amount of his claim against any one of the companies, and that the other companies would be liable to that company for contribution.[187] In determining the amount of the contribution it was held that if any of the companies were insolvent, the amount of contribution was to be determined without reference to them.[188]

§ 2495. Effect under Pro Rata Clause of Payment by any Company of More than Its Share.—If several policies of insurance are issued upon the same interest and risk, and one of them only contains a pro rata clause, and the others or any of them which do not contain such clause pay more than their share, they will be entitled to contribution from the underwriters of the policy which contains this clause.[189] An insurance company is bound, however, to pay its ratable share of loss, and can derive no benefit from excess of payment made by another company where property is insured in several fire insurance companies, and each policy contains a clause that in case of loss the assured shall not be entitled to receive of the company issuing such policy any greater proportion of the loss than the amount insured by such policy bears to the whole amount insured upon the property, and if one of the companies pays more than its ratable share of loss under such a clause, it cannot claim contribution from others which have not paid their share, but must enforce its remedy, if it have any, against the assured.[190]

§ 2496. "American Clause"—"Shall Only be Liable for Deficiency."—A clause known as the "American clause" has been used for many years and to a great extent in marine policies. It defines the insurer's liability both in case of prior and subsequent insurance. In substance, it provides that in

[187] Security Ins. Co. v. St. Paul F. & M. Ins. Co., 50 Conn. 233.

[188] Security Ins. Co. v. St. Paul F. & M. Ins. Co., 50 Conn. 233.

[189] Finley v. Lycoming Ins. Co., 30 Pa. St. 311. See Lucas v. Jefferson Ins. Co., 6 Cow. (N. Y.) 635.

[190] Fitzsimmons v. City F. Ins. Co., 18 Wis. 234; 86 Am. Dec. 761. See, also, Bardwell v. Conway Ins. Co., 118 Mass. 465; Connecticut F. & M. Ins. Co. v. Merchants' etc. Ins. Co. (Va.), 15 Ins. L. J. 615.

case of prior insurance the insurer shall be liable only for the deficiency between the amount of such prior insurance and the actual amount or value of the amount insured, but in case of subsequent insurance, the insurer will be liable to the full extent of the amount subscribed in the policy.[191] Such a condition is binding, and in case of loss, where there has been double insurance, the insurer is only liable for the amount of loss not covered by the prior policy.[192] In Murray v. Pennsylvania Insurance Company[193] this question arose. It appeared that the owners of a vessel had effected insurance upon the same in New York for four thousand dollars, valuing her at that sum, and subsequently procured insurance in Philadelphia for the same sum, valuing her at six thouasnd dollars. Both contained the "American clause." An action was brought for a partial loss, and it was held that the second insurer was only liable for so much of the loss as the prior insurance failed to cover. If, however, several policies of different dates are issued upon a ship, but the entire amount does not exceed the estimated value of the property insured, then it is held that the insurers are all liable pro rata. The "American clause" is held only to apply in cases of double insurance.[194] Where the policy contains this clause the insurer

[191] One of the forms in use is as follows: "If the insured shall have made any other insurance upon the subject insured prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the subject insured, and shall return the premium upon so much of the sum by them assured as they shall be by such prior insurance exonerated from; and in case of any insurance upon the subject matter subsequent in date to this policy, the assurers shall nevertheless be answerable for the full extent of the sum by them subscribed, without right to claim contribution from such subsequent assurer, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made." This was in substance the rule laid down in the French Code of Commerce, sec. 3598, and which was the ancient rule in England (see African Co. v. Bull, 1 Show. 132) prior to the rule laid down by Lord Mansfield.

[192] American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399; Murray v. Pennsylvania Ins. Co., 2 Wash. (C. C.) 186.

[193] 2 Wash. (C. C.) 186.

[194] Whiting v. American Ins. Co., 15 Md. 297. In this case it appeared that the ship was valued at twenty-two thousand dollars, and

cannot, of course, claim contribution from subsequent insurers.[195] If at the time of the making of the subsequent policy containing the "American clause" the property is fully covered by prior insurance, the policy does not attach;[196] but if at any time during the life of such subsequent policy and before a loss the property insured is not fully covered by the prior policies, then the subsequent one will attach. It is held, however, that it will not attach from the mere fact that some of the prior insurers have become insolvent.[197] Where a policy was issued upon a vessel and outfits, "on provisions, oilcasks, iron boilers, and whaling apparatus generally, and on oil, bone, and other takings, empty casks, and whaling apparatus generally, homeward," and also provided that "as fast as oil, bone, or other articles of cargo are procured this insurance is to attach," and a subsequent policy on catchings was effected which contained the "American clause," it was held that, as the amount of catchings was at all times fully covered by the first policy, there was no liability on the part of the subsequent insurers in any manner.[198] It is held that a provision, in a policy on cargo and catchings, that if the assured shall have made any prior insurance on the catchings the underwriters shall be answerable for so much only as the amount of the prior insurance is deficient in fully covering the property at risk, remains in force after a prior policy effecting such insurance is canceled by agreement of the parties thereto without the consent of the other underwriters, although it is canceled before any loss occurs.[199] Where a policy is issued containing the "American clause," a prior policy cannot, by an agreement between the prior insurer and the assured, be canceled

that three policies of different underwriters were issued, two being for seven thousand three hundred dollars and one for seven thousand four hundred dollars, and each containing the American clause.

[195] American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399.

[196] Boyden v. Phœnix Ins. Co., 98 Mass. 185.

[197] Boyden v. Phœnix Ins. Co., 98 Mass. 185.

[198] Lewis v. Manufacturers' F. & M. Ins. Co., 131 Mass. 364.

[199] Macy v. Whaling Ins. Co., 9 Met. (Mass.) 354.

to the prejudice of the subsequent underwriter.[200] And it is held to be error, in those cases where a marine policy contains the "American clause," to determine whether other policies are prior or subsequent thereto by the date of the attaching of the risk.[201]

§ 2497. Where Policies of Different Dates Attach and Property Subsequently Diminished.—If several policies of different dates are issued by different insurers and all of the policies have attached, and if subsequently the property is so diminished that at the time of the loss the amount of insurance in the earlier policies will fully cover the property insured, the question has arisen whether the first insurer is liable to the full amount of the policy, or whether he can claim contribution from the subsequent underwriters. As we have seen, the common law is now settled both in England and the United States that the insurer may recover from any underwriter the amount of loss to the full extent of the policy, and that the insurer may enforce contribution from the other insurers. Consequently, this question will now only present itself in those cases where the policies provide that the insurers shall only be liable for the deficiency between the amount of the prior insurance and the actual amount or value of the property at risk. In American Insurance Company v. Griswold,[202]

[200] Seamans v. Loring, 1 Mason (C. C.), 128; Macy v. Whaling Ins. Co., 9 Met. (Mass.) 354.

[201] Deming v. Merchants' etc. Co., 90 Tenn. 306; 17 S. W. Rep. 89; 13 L. R. Annot. 518.

[202] 14 Wend. (N. Y.) 399. The facts were as follows: Goods to the value of forty-seven thousand and ninety-six dollars were shipped on board a vessel for South America; the plaintiff in error insured the cargo for twenty thousand dollars by a policy containing the American clause. Subsequently, other insurance was effected in other companies, one policy being for ten thousand dollars and the other for fifteen thousand dollars. All were for eighteen months, and were similar to the prior policy in all respects except date. The policies all attached. Before the vessel reached the end of the voyage she was seized, having already disposed of her cargo to the amount of twenty-one thousand dollars. The loss was apportioned by an underwriter in proportion to the amount each had underwritten. The two latter companies paid, but the American refused to. An action was brought

this question arose, and it was there held that where goods are insured to a specified amount on a trading voyage under a policy on time, and the value of the whole cargo exceeds the sum insured, the insurer is liable to the full amount of the subscription if after landing a portion of the cargo in safety the residue is totally lost by one of the perils insured against, provided that at the time of the loss the goods on board equaled in amount the sum insured, and the subsequent insurers are not liable for contribution.[203] Although, as noted

in the supreme court, and was again referred by consent to a broker for adjustment, who subsequently submitted it to the court of errors for decision. The insurers claimed they were only liable in proportion to the amount of their policy (twenty thousand dollars) bore to the value of the entire property when the insurance was effected, which was forty-seven thousand and ninety-six dollars.

[203] This case was considered at great length, and presents an elaborate discussion of the principles involved, and was concurred in by a large majority of the court. Senators Jones and Tracy only dissented, while twenty senators concurred in the opinion. Mr. Phillips criticises this decision (2 Phillips on Insurance, 3d ed., sec. 1261), and asserts that the better doctrine is, that in such case, the loss shall "be ratably apportioned to the several policies." From a careful examination of the case, however, and of the opinion there given both by the majority and minority of the court, we must say that the opinion as expressed by the majority seems clearly the better law. In those cases where the policies contain such a clause as was before the court for construction, it would hardly seem that any other rule could properly be applied than was there stated by the court. The clause in question provided for a ratable return of premuim for so much as they should be by prior insurance exonerated from, and also provided for liability without right of contribution from subsequent insurers. This clause is one in most frequent use, and we fail to see how a different construction could have been given. If there were only a provision that the insurer should only be liable for so much as the amount of such prior insurance might be deficient toward fully covering the subject insured, and there were no further provisions as to the premium, or as to liability "without right of contribution" from subsequent insurers, then the dissenting opinion would certainly be of much weight. Mr. Phillips considers the clause in reference to the return of premium as sustaining his rule, but with all due deference to that learned author we fail to see how it so operates. He says (2 Phillips on Insurance, 3d ed., 1261): "The construction that a diminution of the amount affects the policies proportionally seems conclusively to result from the usual provision that the premium shall be returned upon so much of the sum insured as the underwriter shall be exonerated from by the prior insurance, thus

below,[204] the rule laid down in American Insurance Company v. Griswold[205] has been criticised, yet we think it clearly in accord with the expressed intention of the parties, and both reasonable and just.

§ 2498. Presumption as to Basis of Settlement where Settlement Made with One of Two Insurers.—Where the in-

specifically providing for a concurrence of the exoneration from risk and return of premium, and requiring the return in case of exoneration." The provision in the policy is that the assurer shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the subject insured, and shall return the premium upon so much of the sum by them assumed as they shall be by such prior insurance exonerated from. We do not think that the construction contended for by Mr. Phillips can reasonably be given to this clause. If construed as worded and as apparently intended, the rule stated in American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399, is the proper one. But we have the further provision of this clause as an aid, and the entire clause must be construed as a whole. The clause is this: In case of subsequent insurance "the assurers shall nevertheless be answerable for the full extent of the sum by them subscribed, without right to claim contribution from such subsequent assurer, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made." The clause construed as a whole certainly evidences a clear intention to hold the prior insurers liable for the full loss, without right of contribution from subsequent underwriters. And Mr. Phillips, in speaking of this condition, says (2 Phillips on Insurance, 3d ed., 1251): "Under this provision the amount of interest in respect to the subsequent policy against the same risks is the excess of the value over the amount insured by the previous policies." This is undoubtedly the true rule in all cases, and it is in conformity to the established practice in this country. In marine insurance the liability of the several insurers for a total loss, whether actual or constructive, where the policies are not simultaneous, is in the order of the dates of the several policies; no liability attaching to the second or other subsequent policy except as to the excess of the loss over the amount of all previous policies on the same interest. If two or more policies bear date upon the same day, they are deemed to be simultaneous, and the liability of the insurers in simultaneous policies is to contribute ratably with each other. The insolvency of any of the insurers does not affect the proportionate liability of the other insurers. The liability of all insurers on the same marine interest for a partial or average loss is to contribute ratably: Deering's Annot. Civ. Code Cal., sec. 2642.

[204] See last note.

[205] 14 Wend. (N. Y.) 399.

sured, in case of double insurance, accepts one-half the loss from one of such companies, after deducting certain setoffs, he will be deemed prima facie to have elected to adjust the loss against the other upon the same basis.[206]

§ **2499. Double Insurance for "Whom It may Concern."** Insurers have no insurable interest in the property insured by them regarded in the light of owners, and therefore can have no action on a policy of double insurance made for the benefit of "whom it may concern." [207]

[206] Wiggin v. Suffolk Ins. Co., 18 Pick. (Mass.) 145; 29 Am. Dec. 576.
[207] Alliance Ins. Co. v. Louisiana Ins. Co., 8 La. 1; 28 Am. Dec. 117.

TITLE X.

VOID AND ILLEGAL INSURANCES AND EXCEPTED RISKS AND LOSSES

(2467)

TITLE X.

VOID AND ILLEGAL INSURANCES AND EXCEPTED RISKS AND LOSSES.

CHAPTER LIV.

VOID AND ILLEGAL INSURANCES.

§ 2506. General principles as to void and illegal contracts.
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§ 2506. General Principles as to Void or Illegal Contracts.—As we have noted elsewhere, contracts are presumed to be made with reference to the laws and constitution of the land existing and in force at the time the contract is entered into, so far as such laws are applicable, and also with reference to valid and subsisting commercial treaties between this country and foreign states, so far as the same may be applied.[1] So also the power of Congress under the constitution

[1] Sec. 194, herein. As to the binding force of treaties upon subjects of the contracting powers, see The Eenrom, 2 C. Rob. 6, where it is said: "Every treaty is a part of the public law of the country, which has entered into that treaty, and is as binding on the subjects as any part of their municipal laws," per Sir William Scott. The Neutralitet, 3 C. Rob. 296; Cooley's Constitutional Limitations, 6th ed., 18; Wilson v. Maryatt, 8 Term. Rep. 31; 1 Bos. & P. 430. But see Leber v. Fletcher, reported in 1 Marshall on Insurance, ed. 1810, 61, and examine note on this case in 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 693, as to how far existing law enters into and forms part of the contract. It is said in 2 Story on the Constitution, 5th ed., secs. 1383, 1384: "But much diversity of opinion has been exhibited on another point, how far the existing law enters into and forms a part of the contract. It has been contended by some learned minds that the municipal law of a place where a contract is made forms part of it, and travels with it wherever the parties to it may be found. If this were admitted to be true, the consequence would be that all the existing laws of a state, being incorporated into the contract, would constitute a part of its stipulations, so that a legislative repeal of such laws would in no manner affect it. . . . . Although the law of the place acts upon a contract and governs its construction, validity, and obligation, it constitutes no part of it. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states by arrest-

extends[2] to the regulation of navigation, and also to every species of commercial intercourse between the United States and foreign nations, and among the several states; it further extends to all vessels, whether propelled by the instrumentality of steam machinery or winds and sails.[3] But a policy of insurance is not commerce under the federal constitution, even though the parties reside in different states; the contract is merely one of indemnity. When Congress has, under the constitution, a right to legislate upon a subject, the exercise of the right by Congress renders inoperative a state law upon the subject.[4] In matters relating to the form or stipulations of the contract, the express provisions of the law may be varied from where they are not prohibitory and concern neither the essence of the contract, nor public property, nor good morals, but if the law is prohibitory, and relates to matters which are

ing their power to repeal or modify such laws with respect to existing contracts. . . . . The law acts upon contracts. It performs the office of interpretation. But this is very different from supposing that every law applicable to the subject matter as a statute of limitations or a statute of insolvency enters into the contract and becomes a part of the contract; such a supposition is neither called for by the terms of the contract, nor can be fairly presumed to be contemplated by the parties as matters ex contractu. The parties know that they must obey the laws, and that the laws act upon their contracts, whatever may be their intention." " 'The obligation of a contract,' it is said, 'consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning' ": Cooley's Constitutional Limitations, 4th ed., pp. 349, *285, citing McCracken v. Hayward, 2 How. (U. S.) 612; Ogden v. Saunders, 12 Wheat. (U. S.) 259, per Washington, J. "Contracts made within a state where an insolvent law exists between citizens of that state are to be considered as made in reference to the law, and are subject to its provisions": Cooley's Constitutional Limitations, 4th ed., pp. 360, *294.

[2] Act 1, sec. 8.

[3] Gibbons v. Ogden, 9 Wheat. (U. S.) 1, per Marshall, C. J. See Lord v. Steamship Co., 102 U. S. 541, as to how far this power is exclusive. See Cooley's Constitutional Limitations, 6th ed., 595, 720-32.

[4] Caldwell v. St. Louis Perpet. Ins. Co., 1 La. Ann. 85.

of the essence of the contract itself, it must be conformed to in effecting the contract.[5] The contract, therefore, may be void because it violates the prohibitory law,[6] or for the same reasons stipulations of the contract may be unenforceable. So a contract may be illegal because contrary to positive law, as in case of a statute against insurance of lottery tickets; such insurance is, however, of itself against public policy;[7] or an agreement may be void both on the ground of public policy and because contrary to a statute;[8] or a statute may affect the validity of acts of the assurer, as in case of making assessments.[9] In these and in numerous other cases noted throughout this work statutory provisions may naturally affect the question of the validity of the contract, and the right to enforce the same, or the rights acquired and obligations to be performed. But the contract must depend upon the laws in existence when it was made. These, as above stated, are necessarily referred to in every contract, and form a part thereof as the measure of the obligation to perform them by one party and the rights acquired by the other, and such laws are not retroactive, nor may they impair the obligation of contracts.[10]

[5] Emerigon on Insurance, Meredith's ed. 1850, c. ii, sec. 7, p. 48; White v. Connecticut L. Ins. Co., 4 Dill. (C. C.) 177. That stipulations in violation of prohibitory terms of statutes are void, see Dugger v. Insurance Co., 95 Tenn. 245; 32 S. W. Rep. 5; citing Reilly v. Franklin Ins. Co., 43 Wis. 449; Beaumont v. Brewers' Ins. Co., 43 Wis. 463; Oshkosh v. Germania Ins. Co., 71 Wis. 454; 37 N. W. Rep. 819; Thompson v. Citizens' Ins. Co., 45 Wis. 388; Emery v. Piscataqua F. & M. Ins. Co., 52 Me. 322; White v. Insurance Co., 4 Dill. (C. C.) 177; Fletcher v. Insurance Co., 13 Fed. Rep. 526; Wall v. Equity L. Assn., 32 Fed. Rep. 273.

[6] See Greene v. Walton, 59 Hun (N. Y.), 102; 35 N. Y. St. Rep. 881; 13 N. Y. Supp. 147.

[7] Mount v. Wardell, 7 Johns. (N. Y.) 434. See 2 Story on Constitutional Law, 5th ed., secs. 1383, 1384. As to contracts in violation of statutes, see 1 Story on Contracts, 5th ed., p. 719, § 750, et seq.

[8] Richard v. Manhattan Ins. Co., 31 Mo. 518.

[9] Naill v. Kansas Farmers' Ins. Co., 47 Kan. 223; 27 Pac. Rep. 854; Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771.

[10] McCracken v. Hayward, 2 How. (U. S.) 612, per Mr. Justice Baldwin; Trustee v. Bailey, 10 Fla. 112; 81 Am. Dec. 194; Hope M. Ins. Co. v. Flynn, 38 Mo. 483; 90 Am. Dec. 438; Ogden v. Saunders, 12 Wheat. (U. S.) 259, per Washington, J.

§ **2507. Distinctions to be Observed.**—In considering however, the question of illegal and void insurances, there is a difference between those cases where the invalidity of the contract rests upon some law which relates to the contract itself, and the rights acquired and obligations to be performed thereunder, and those cases where the illegality or invalidity rests upon some law which does not define, or attempt to define, the rights and duties of the parties.[11] There is also a distinction between an agreement to do a thing which cannot be performed without violating the law and an agreement to perform in an illegal manner a contract which can be legally performed. In the latter case the intention to break the law must be shown.[12] A distinction further exists between those cases where by the terms of the insurance it is made a necessary condition that the illegal act shall be done, or which are in effect insurances of an illegal traffic, and cases where the subject matter insured is susceptible of a lawful use, and concerning which no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts in which no illegal design enters are not illegal because remotely connected with an illegal transaction.[13] In certain cases a contract may be valid, even though it is connected with an independent illegal transaction which it in no way is designed to aid or promote.[14] There is also a distinction between contracts founded on a transaction malum in se, or which is prohibited by statute on the ground of public policy, and which influences the public welfare, and contracts founded on transactions prohibited for the benefit of particular individuals, as distinguished from the public at large, and which are not intended to affect the general welfare; as in case of a statute designed solely for benefit of the ship's crew, such as carrying a certain quantity of water under deck, and providing a remedy in favor of the crew.[15]

[11] See 1 Duer on Marine Insurance, ed. 1845, 314.

[12] Waugh v. Morris, L. R. 8 Q. B. 208, per Blackburn, J.

[13] Niagara F. Ins. Co. v. De Graff, 12 Mich. 124, per Campbell, J.

[14] Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157, per Story, J.; citing Armstrong v. Toler, 11 Wheat. (U. S.) 258.

[15] Warren v. Manufacturers' Ins. Co., 13 Pick. (Mass.) 518, per Wilde J.; Ward v. Wood, 13 Mass. 539, 546. See sec. 2542, herein.

§ 2508. **Sanitary Inspection of Buildings not within Insurance Law.**—The business of "inspection and certification as to the sanitary conditions of buildings and premises" is not within the purview of the insurance law of the state of New York, and is not authorized to be carried on by a corporation under the statute providing for the organization of casualty insurance companies, and the attorney general may refuse to attach his certificate of approval to the declarations and charter which specify such business as a part of that proposed to be carried on.[16]

§ 2509. **Life Insurance a Valid Contract.**—A policy of insurance upon life is a valid contract.[17]

§ 2510. **Stipulation Valid Suspending Policy while Matured Premium Note Remains Unpaid.**—A condition in an insurance policy that in case a premium note is not paid in full at maturity the policy shall be inoperative so long as it remains unpaid is a valid condition, and is a good defense to an action on the policy for a loss occurring during the period of default.[18]

§ 2511. **Waiver of Condition Rendering Policy Void from Inception.**—If a policy contains a condition which renders it void from its inception, the insurer having full knowledge thereof from the recitals of the policy or otherwise at the time of issuing the policy, he thereby waives the right to insist on the condition, and this rule applies to a policy of title insurance, and where it appears from certain contracts referred to and made a part of policy that the insurer must have known certain warranted representations to be false at the time of assuming the risk, it waives his rights.[19]

§ 2512. **Insurance Contract Based on Fraud Invalid.** In conformity with the general principle that fraud vitiates

[16] People ex rel. Woodward v. Rosendale, 142 N. Y. 126; 58 N. Y. St. Rep. 629; affirming 76 Hun (N. Y.), 103; 27 N. Y. Supp. 837.

[17] Lord v. Dall, 12 Mass. 115; 7 Am. Dec. 38.

[18] Home F. Ins. Co. v. Garbaez (Neb. 1896), 67 N. W. Rep. 864.

[19] Quigley v. St. Paul Title etc. Co., 60 Minn. 275; 62 N. W. Rep. 287; affirmed, 66 N. W. Rep. 364.

all contracts, a contract of insurance based on fraud is invalid;[20] as in case of a life risk where the policy is delivered in fraud of the company.[21]

§ **2513. Marriage Insurance.**—A contract of insurance which is in effect a contract in restraint of marriage, as where an association agrees with a member that he will not marry for two years, or will pay a certain sum to his wife.[22] So a contract to pay a certain sum of money to A on his marriage with B, on condition that A shall give the promisor "the exclusive right to carry the marriage benefit insurance" on A and B, is void.[23]

§ **2514. Constitutionality of Statute Regulating Printing Conditions in Policies.**—By a statute of the state of Virginia[24] it was provided that no violation of any of the conditions of an insurance policy issued after the date when such statute took effect should be a valid defense to an action on the policy, unless such condition or conditions as were relied on as a defense were printed either in type at least as large as that known as "long primer," or were written upon the policy, and it was held that such statute was legal, and not in conflict either with the United States constitution or that of the state of Virginia.[25]

§ **2515. Statute Requiring Insurer to Pay Losses in Full Constitutional.**—A statute which provides that insurance companies shall pay losses in full not exceeding the

[20] See Alsop v. Commercial Ins. Co., 1 Sum. (C. C.) 451; Atlantic Ins. Co. v. Lunar, 1 Sand. Ch. (N. Y.) 91; Chaflin v. Insurance Co., 110 U. S. 81, per Matthews, J.; Barkis v. Walters, 8 Beav. 92; Goix v. Knox, 1 Johns. Cas. (N. Y.) 340, per Curiam; Foster v. Charles, 7 Bing. 105, per Bosanquet, J.; Prince of Wales Assn. v. Palmer, 25 Beav. 605; Leach v. Republic Ins. Co., 56 N. H. 401; Haigh v. De La Cour, 3 Camp. 319; Hersey v. Merrimac Co. Ins. Co., 7 Fost. (27 N. H.) 149; Nassaner v. Susquehanna Mut. F. Ins. Co., 100 Pa. St. 507.

[21] Piedmont Ins. Co. v. Ewing, 92 U. S. 377.

[22] State v. Towle, 80 Me. 287; 14 Atl. Rep. 195.

[23] James v. Jellison, 94 Ind. 292; 48 Am. Rep. 151.

[24] Code Va., sec. 3252.

[25] Dupuy v. Delaware Ins. Co., 63 Fed. Rep. 680; 24 Ins. L. J. 161.

amount of insurance expressed in the policy, and that stipulations to the contrary shall be null and void, does not deprive any person of his property without due process of law, and is not in violation of the federal constitution, section 1 of the fourteenth amendment, since the right to contract is not unlimited, but is subject to limitations imposed by public policy or the exercise of the police power, and is therefore to this extent the subject of legislative control.[26]

§ 2516. Illegality of Contract Insuring Mercantile Credits.—Under the Massachusetts statute[27] no authority is given to any insurer, domestic or foreign, to insure mercantile credits or accounts, and an insurance which purports to bind the insurer, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors or judgment debtors against whom execution should be returned unsatisfied, is invalid, and although the illegality of the contract is not set up as a defense nor noticed in the court below, yet the court will not consciously lend its aid for the enforcement of such illegal contract, such question having been brought to the attention of the counsel on argument, and an opportunity to file briefs being given.[28]

§ 2517. When Insurance of Growing Grain Ultra Vires. Where neither the statute nor the articles of incorporation of a mutual company authorize the insurance of standing or growing grain, and the statute by its terms expressly forbids it, the

[26] Dugger v. Mechanics & Traders' Ins. Co., 95 Tenn. 245; 32 S. W. Rep. 5, per Beard, J. (a well-considered case). In support of the general principle the court cites Coleman v. Satterfield, 2 Head (Tenn.), 264; Taylor v. Taylor, 12 Lea (Tenn.), 490; Truss v. State, 13 Lea (Tenn.), 311; Queen Ins. Co. v. Leslie, 47 Ohio St. 409; 24 N. E. Rep. 1072; German Ins. Co. v. Eddy, 36 Neb. 461; 8 Am. Rail. & Corp. Cas. 115.

[27] 1887, c. 214, sec. 78.

[28] Claflin v. United States Credit System Co. (Sup. Jud. Ct. Mass. 1896), 43 N. E. Rep. 293, per Barker, J., citing on last point Snell v. Dwight, 120 Mass. 9; Dunham v. Presby, 120 Mass. 285; Riley v. Jordan, 122 Mass. 231, 233; Low v. Peers, Wilm. 364, 378.

insurance of standing grain against loss by hail is ultra vires and void.[29]

§ 2518. **When Endowment Insurance by Beneficiary Association Ultra Vires.**—If the act under which a beneficiary association is incorporated provides only for payment in case of death, or for payments in case a member is disabled by sickness or other disability, such society is not authorized to conduct an insurance payable at the expiration of a fixed period, that being an endowment insurance.[30]

§ 2519. **Stipulations Limiting Place of Bringing Suits.**—If a marine insurance contract issued in a foreign country provides that suits on the policy shall be prosecuted only in a specified foreign court, such stipulation is invalid.[31] So stipulations generally giving jurisdiction where the law has not given it are, as a rule, invalid;[32] although clauses conferring such jurisdiction have been upheld, especially in case of a mutual company or benefit order where the clause exists in the company's charter.[33]

§ 2520. **Statute may Affect Right of Recovery by Enlarging Rights of Assured under its Stipulations.**—The right of the assured to recover under the contract may be enlarged by statute, whereby a less limited construction is given to warranties and stipulations and the effect of misrepresentations than would otherwise be given; as where a statute provides that neither misrepresentations nor warranties shall affect the right of assured to recover unless material to the risk

[29] Delaware Farmers' Mut. F. Ins. Co. v. Wagner; Delaware Farmers' Mut. F. Ins. Co. v. Knuppel, 56 Minn. 240, 243.

[30] Walker v. Commissioner of Insurance, 103 Mich. 344; 61 N. W. Rep. 512; Laws Mich. 1869, How. Stats., c. 118, Act No. 104.

[31] Slocum v. Western Assur. Co., 42 Fed. Rep. 235.

[32] Hall v. People's Mut. Ins. Co., 6 Gray (Mass.), 185, per Shaw, C. J.; Bartlett v. Hamilton etc. Ins. Co., 6 Gray (Mass.), 174.

[33] Eggleton v. Centennial L. Assn., 19 Fed. Rep. 201; 18 Fed. Rep. 14; Arnet v. Mechanics' Mut. etc. Co., 22 Wis. 516; Boynton v. Middlesex Mut. F. Ins. Co., 4 Met. (Mass.) 212; Portage Co. Mut. Ins. Co. v. Stukey, 18 Ohio, 455.

and fraudulent;[34] or a statute may provide when a contract may be avoided for mistake, etc.[35]

§ 2521. **Where Assured has no Such Interest as Statute Requires.**—A contract may not be enforceable because the assured has not such an interest in the subject matter as the statute requires,[36] or because a statute prohibits insurance thereof.[37]

§ 2522. **Navigation and Convoy Acts of England.**—In England, there are certain decisions concerning the construction of certain navigation laws now repealed, as well as of certain acts arising out of the French revolution, and continuing in force only during the hostilities which occasioned their passage, and it was held that traffic and voyages carried on in contravention of the navigation laws were illegal, as well as insurances on risks contravening the convoy acts.[38]

§ 2523. **Effect upon Valid Contract of Statute Laying Embargo.**—If, after a valid policy has attached upon a risk which was valid in its inception and origin, an act is passed laying an embargo, the contract is not dissolved,[39] and the ar-

[34] Kenton Ins. Co. v. Wigginton, 89 Ky. 330; 12 S. W. Rep. 668; 7 L. R. Annot. 81.

[35] Sleeper v. New Hampshire F. Ins. Co., 56 N. H. 401.

[36] Southern Ins. & Trust Co. v. Lewis, 42 Ga. 587; Meeina v. Destruct. Ins. Co., 22 U. C. Q. B. 214. As to wager policies, see secs. 148-55, herein.

[37] Murphy v. Bell, 4 Bing. 567; 1 Moore & P. 493; Edgar v. Fowler, 3 East, 222; Lees v. Smith, 7 Term Rep. 338; Booth v. Hodgson, 6 Term Rep. 405. For other decisions upholding the principles under this section, see under 19 Geo. II, c. 37, sec. 1, Mortimer v. Broadwood, 17 Week. Rep. 653; under 6 Geo. III, c. 18, sec. 12, Branton v. Taddy, 1 Taunt. 6; under 14 Geo. III, c. 48, Dowker v. Canada L. Ins. Co., 24 U. C. Q. B. 591; Patterson v. Powell, 9 Bing. 320; 2 Moore & S. 399; Evans v. Bignold, 4 L. R. Q. B. 622; under 30 Vict., c. 7, In re Arthur Aver Assn. Ex parte Hargrave, 10 L. R. Ch. 542.

[38] See 1 Arnould on Marine Insurance, Perkins' ed. 1850, 711, *708, et seq., 719, *717, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 695, et seq., where navigation laws in force are noted.

[39] As a general rule a subsequent law making an otherwise lawful contract to do a thing unlawful operates as a repeal of the contract obligation in ordinary contracts: Bradford v. Jenkins, 41 Miss. 328.

rest or detention, whether the embargo be that of the assured's own government or of any other government, is a peril covered by the policy, and a valid ground of abandonment.[40] And in case of a vessel detained in port under a policy "at and from," the underwriter would be liable for the arrest and detainment.[41] If, however, the restraint will probably only be temporary, the assured may elect to prosecute the voyage when it is removed.[42]

§ 2524. Effect of Subsequently Enacted Statutes upon Void or Illegal Insurances.—An insurance which covers a risk void and illegal in its inception and origin, because contrary to an express law or prohibition of law, is not validated by a subsequently enacted law which expressly or impliedly repeals the former statute, since the validity of the policy must be judged by the statute in force when made. In applying this rule, however, to marine insurance consideration must be given to the fact whether the voyage insured is entire.[43]

[40] Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404, per Sutherland, J.; McBride v. Marine Ins. Co., 5 Johns. (N. Y.) 318, per Kent, C. J.; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 312. See, also, Green v. Young, 2 Ld. Raym. 840; Salk. 444; Touteng v. Hubbard, 3 Bos. & P. 302, per Lord Alvanley; Hagedown v. Whitmore, 4 Stark. 157; Bazett v. Meyer, 5 Taunt. 829. "From the moment of capture or arrest the owners are considered as having lost their power over the ship and cargo and are deprived of the free disposal of them; because in the opinion of the merchant his right of disposal being suspended or rendered uncertain is equivalent to a total deprivation": 2 Marshall on Insurance, ed. 1810, *510, 563 a, citing Lord Mansfield's judgment in Goss v. Withers, 2 Burr. 683, 696. See, also, Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 30, 7, 424.

[41] Green v. Young, Salk. 444; Rotch v. Edie, 6 Term Rep. 413.

[42] 1 Duer on Insurance, ed. 1845, 351, sec. 39. See Hadley v. Clark, 8 Term Rep. 259, as to obligation to prosecute the voyage when the restraint is removed, the contract being a charter-party.

[43] Morck v. Abel, 3 Bos. & P. 85, reported in Marshall on Insurance, ed. 1810, 647; 1 Duer on Marine Insurance, ed. 1845, 373. The above rule is in conformity with that applicable to other contracts: Roby v. West, 4 N. H. 285; 17 Am. Dec. 423 (in this case the act was prohibited under penalty, and it was held not validated by the mere repeal of the statute); Branchor v. Mensel, 47 Me. 58; McCauley v. Brooks, 16 Cal. 11; Gilliland v. Phillips, 1 S. C. 152; Murrel v. Jones, 40 Miss. 565. "It is also, at least, doubtful whether the intention to cover a

But cases of this character differ from those where the defense to a contract is based upon some information which does not affect the substantial equities, and which some subsequent statute in the nature of a retrospective law takes away by giving the contract a different effect than that which it has under the law under which it was made; for a party has no vested right in a defense of such a character.[44]

§ 2525. Whether Policy Void—Stamp, When Required by Statute.—It is held that an instrument is not void for want of a stamp when required unless there be an intent to defraud the government,[45] and there are numerous cases which hold that unstamped papers are admissible as evidence, and also that Congress has no power to exclude unstamped papers from use as evidence in state courts, and that the law must be confined in its operation to the federal courts.[46]

future voyage prohibited by a law then existing but not yet in force would be sufficient to avoid the contract should the law be repeated before the contemplated voyage is begun": 1 Duer on Marine Insurance, ed. 1845, 372.

[44] Cooley's Constitutional Limitations, 6th ed., 454, et seq., 460, et seq.; Pryce v. Security Ins. Co., 29 Wis. 270.

[45] Dudley v. Wells, 55 Me. 145; Mitchell v. Home Ins. Co., 32 Iowa, 421; citing Campbell v. Wilcox, 10 Wall. (U. S.) 421; Latham v. Smith, 45 Ill. 29; Hunter v. Cobb, 1 Bush (Ky.), 239; Sayles v. Davis, 22 Wis. 225, and cases cited in next note. See, also, Webster v. Riggs, 3 W. Va. 445; Hitchcock v. Sawyer, 39 Vt. 412; Hallock v. Jandin, 34 Cal. 167; Howe v. Carpenter, 53 Barb. (N. Y.) 382; New Haven etc. Co. v. Quintard, 6 Abb. Pr., N. S. (N. Y.), 128, contra to last case.

[46] McElvaine v. Mudd, 44 Ala. 48; 4 Am. Rep. 106; Bumpass v. Taggart, 26 Ark. 398; 7 Am. Rep. 623; Duffy v. Hobson, 40 Cal. 240; Jacquin v. Warren, 40 Ill. 459; Bowen v. Byrne, 50 Ill. 467; Craig v. Dirnock, 47 Ill. 308; United States Express Co. v. Haines, 48 Ill. 248; Griffin v. Ranney, 35 Conn. 239; Hunter v. Cobb, 1 Bush (Ky.), 339; Bashey v. Ivins, 22 Iowa, 163; Dudley v. Wells, 55 Me. 145; Green v. Holmy, 101 Mass. 243; 3 Am. Rep. 339; Carpenter v. Suelting, 97 Mass. 452; Trull v. Moulton, 12 Allen (Mass.), 396; Clemens v. Conrad, 19 Mich. 170; Davis v. Richardson, 45 Miss. 499; 7 Am. Rep. 732; Haight v. Grist, 64 N. C. 739; Moore v. Moore, 47 N. Y. 467; 7 Am. Rep. 466; Hitchcock v. Sawyer, 39 Vt. 412; Hale v. Wilkinson, 21 Gratt. (Va.) 75; Twitchell v. Commonwealth, 7 Wall. (U. S.) 321. Contra, Chaters etc. Co. v. McNamara, 72 Pa. St. 228; Charters Turnpike v. Bridge, 7 Alb. L. J. 56, and note on p. 49; McLean v. Skelton, 18 La. Ann. 514; Maynard v. Johnson, 2 Neb. 16; Cooley's Constitutional Limitations,

§ **2526. Engaging in Trade in Expectation of Repeal of Existing Law Interdicting it.**—If insurance is effected upon a vessel intended to be engaged in a trade in violation of a law prohibiting it, and some act, such as commencing the voyage, is done in furtherance of the illegal intent, the expectation that such law will be repealed is not sufficient to validate an insurance thus void in its inception and origin, even though such expectation rests upon a possible contingency that the law may be repealed.[47]

§ **2527. Effect of Subsequently Enacted Prohibitory Law.**—An insurance covering a risk valid in its inception and origin is not rendered void by a subsequently enacted law making the risk illegal if the prohibited acts are done, unless there be notice, express or implied, in the sense that actual knowledge may fairly be presumed. Where such presumption cannot reasonably be held to exist, it would seem that it would be incumbent upon the party seeking to avoid the contract obligation to sustain the burden of proof, but the fact that mere vague reports and loose, uncertain rumors heard by one whose relation to the assured is not such as to make his acts or knowledge binding upon assured, is not sufficient of itself to subject the latter to the consequences of an intentional violation of the prohibitory act; such, at least, is the rule deductive from a New York decision cited below.[48]

§ **2528. Same Subject—Case.**—In the case relied on as supporting the rule stated under the last section a valued policy "at and from" was effected on December 18th. The Embargo Act of Congress of 1807 was passed December 22d, but was not known at the port of New York, whence the ship

6th ed., 592, n. 2; May on Insurance, 3d ed., sec. 25. For English decisions under Stamp acts, see Allen v. Morrison, 3 Moody & R. 70; Hill v. Patten, 8 East, 373; Caldwell v. Dawson, 5 Exch. 1; Kensington v. Inglis, 8 East, 273; Ramstrom v. Bell, 5 Maule & S. 267; Rapp v. Allnutt, 15 East, 601; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 255, et seq.

[47] Gray v. Sims, 3 Wash. (C. C.) 276, per Washington, J.; 1 Duer on Marine Insurance, ed. 1845, 369-73, secs. 59-61.

[48] Walden v. Phœnix Ins. Co., 5 Johns. (N. Y.) 310.

sailed, at the time of the commencement of the risk, although there was a vague and uncertain rumor of an embargo having taken place of which the pilot, it seems, had heard on the morning the ship sailed, but no actual knowledge of the embargo was brought home to the master or owners. The vessel a few hours after she had sailed, and while within the harbor limits, was detained by the collector of the port on the day he received intelligence of the embargo, and the insurers were held not released.[49]

[49] Walden v. Phœnix Ins. Co., 5 Johns. (N. Y.) 310. But see Tucker v. De Longuemere, 1 Johns. (N. Y.) 20. There are two views which may be taken of the decision noted in the text. The rule above stated, although seemingly in conflict with the general rule excluding a showing of an ignorance of a law which one has violated, and although an intentional violation of the prohibited law would in the case here relied on have been a criminal act, yet the insurer's right to the premium had become fixed by the attachment of the risk, and there was no intentional violation of the law, unless such intent could be presumed under the circumstances of the case, and the rule seems a fair and equitable one under the circumstances of the case: 2. Taking another view of the case, however, a question might fairly exist whether the voyage was not commenced with a knowledge of the existence of the prohibitory law, and therefore avoided the contract of insurance. Again, the query is pertinent if an equitable exception be admitted to exist in such a case whether the courts would not be justified by such a precedent in extending an equitable exception to other cases, and the difficulty would arise as to where the line of demarcation should be drawn. Certainly, if the court was justified in its decision in this case, why could it not be urged as justifying the exercise of some like rule in other cases where a like departure from the rules of law would under the circumstances seem equally reasonable. It is true that any decision other than the one given in this case would have operated as a hardship against the assured, but that of itself is no sufficient excuse justifying such departure. We can see no difference between a case of this character and one where the risk commenced after the law becomes of force, but the assured has no actual knowledge of its existence. In the case in question the act of sailing violated the embargo. There is no difference between such a violation and the violation where the policy attaches after the law becomes of force and effect, and the assured has no actual knowledge of the law's existence because of its recent passage: See Lubbock v. Potts, 7 East, 449; Tucker v. De Longuemere, 1 Johns. (N. Y.) 20; Dunham v. American Ins. Co., 12 Wend. (N. Y.) 463; 2 Hall (N. Y.), 422; Morck v. Abel, 3 Bos. & P. 35; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 320, per Washington, J. Examine The Merrimac, 8 Cranch (U. S.), 377; The Compte de Wahrenzoff, 1 C. Rob. 205,

§ **2530. Effect of Arbitration Clauses.**—The question whether arbitration clauses in policies of insurance are valid has been, and still is, the source of constant discussion by the courts, and will be fully considered hereafter. It may be stated here, however, that in so far as such clauses are so worded as to be against public policy, or the language is such that they would if enforced have the effect of ousting courts of jurisdiction, they are invalid and unenforceable.[50] There are numerous cases, however, where arbitration clauses are so worded that they have been held valid and enforceable,[51] especially where the charters of mutual companies or benefit societies provide for a resort to arbitration.[52]

§ **2531. Insurances Contrary to Policy of the Law.**—An insurance is illegal if it be contrary to public policy, equally if it contravenes a positive law.[53] So it is held that a provision in a certificate of insurance issued by a mutual society, organized under a statute which provides that the

on the point of ignorance; 1 Duer on Marine Insurance, ed. 1845, 354, 355, 402; 1 Phillips on Insurance, 3d ed., 134, sec. 218, n. 3, pp. 492, 493, sec. 907.

[50] German-American Ins. Co. v. Etherton, 25 Neb. 505; 41 N. W. Rep. 406; Gilmon v. Caledonian Ins. Co. (Scot. Ct. Sess. 1891), 28 Scot. L. Rep. 899; Rowe v. Williams, 97 Mass. 163; Insurance Co. v. Morse, 20 Wall. (U. S.) 445; Reid v. Washington F. & M. Ins. Co., 138 Mass. 572; Robinson v. Georges Ins. Co., 17 Me. 171; 35 Am. Dec. 239; Pioneer Mfg. Co. v. Phœnix Ins. Co., 110 N. C. 176; 10 S. C. Rep. 239; Trott v. City Ins. Co., 1 Cliff. (C. C.) 439; Crossley v. Connecticut F. Ins. Co., 27 Fed. Rep. 30; Stephenson v. Piscataqua F. & M. Ins. Co., 54 Me. 55. See chapter on arbitration, herein.

[51] Hamilton v. Liverpool etc. Ins. Co., 136 U. S. 242; 10 Sup. Ct. Rep. 945. See chapter on arbitration, herein.

[52] Reeves v. White, 10 Eng. L. & Eq. 332.

[53] Mount v. Waite, 7 Johns. (N. Y.) 434; O'Hara v. Carpenter, 23 Mich. 410; Roebuck v. Hammerton, Cowp. 737; Carter v. Boehm, 3 Burr. 1905. See secs. 148-54, herein. A stipulation that assured shall not bring any action to enforce the provisions of the contract except against the attorney in fact representing all the underwriters is null and void as against public policy, but the underwriter is nevertheless obligated to pay in case of loss: Knorr v. Bates (N. Y. Ct. Com. Pleas, 1895), 67 N. Y. St. Rep. 592; 70 N. Y. St. Rep. 686. Insurance of lottery or lottery prize unauthorized: Deering's Annot. Civ. Code Cal., sec. 2532.

directors shall be jointly and severally liable for its debts, to the effect that such directors shall assume no liabilities by reason of the issue of such certificate, is void, as in contravention of the statute and of public policy.[54]

§ 2532. **Condition Upholding Suicide whether Void.** Mr. Bunyon is of opinion that a stipulation to uphold suicide would be contrary to sound policy, and would take away "one of the restraints operating in the minds of men against the commission of crimes by the interest which they have in the welfare and prosperity of their connections. . . . . For a policy, moreover, to remain in force when death arose from any such cause would be a fraud upon the insurers, for a man's estate would thereby benefit by his own felonious act."[55]

§ 2533. **Insurance by Common Carrier against Losses from Negligence, etc., not against Public Policy.**—While a common carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against the very same losses. Therefore, he may by insurance indemnify himself against loss or injury to property intrusted to his care, even where the loss or injury is caused by his own or his servant's negligence.[56]

[54] Greene v. Walton, 59 Hun (N. Y.), 102; 35 N. Y. St. Rep. 881; 13 N. Y. Supp. 147.

[55] Bunyon on Life Insurance, 2d ed., 72; relying upon Amicable Society v. Bolland, 4 Bligh, N. S., 194; 2 Dow & C. 1, per Lord Lyndhurst. But he adds (Bunyon on Life Insurance. 2d ed., 74) that when the insurance is on the life of a nominee, the insurance can be no inducement to the criminal act, and may be construed to cover this as well as every other risk. Provision to pay suicide or not is void: Amicable Ins. Co. v. Bolland, 2 Dow & C. 1; 4 Bligh, N. S., 194; Moore v. Woolsey, 4 El. & B. 243. See secs. 2641, 2643, 2644, herein.

[56] Casualty Ins. Co.'s Case, 82 Md. 535, 576. See opinion of McSherry, J. That common carrier may insure goods in possession as "goods in trust as carriers to the full value, and in case of loss by fire may recover the full amount, even though by statute or by special contract the carrier is not responsible for losses by fire, see L. & M. Ry. Co. v. Glyn, 28 L. J. Q. B. 188; 5 Jur., N. S., 1004, cited in Macnamara on Carriers, ed. 1888, p. 94. Common carriers or telegraph

§ **2534. Policy Executed on Sunday.**—If the policy and premium note are executed on Sunday, the contract is void, and no recovery can be had on the note even though both note and policy be postdated, there being no subsequent ratification of the act.[57]

§ **2535. Newspaper Company cannot Carry on Accident Insurance Business.**—A company organized with power to publish a newspaper and conduct a general printing business cannot, it is held, insure against accidents, and as a coupon printed in a daily newspaper by which the publishers agree that, in case any person meeting death by accident, and having a copy of the newspaper on his person with his name signed in the blank space in the coupon, they will pay to the heir of such person a certain sum, constitutes an accident policy, it is beyond the powers of the company to issue it.[58]

§ **2536. Where Traffic Insured Unlawful, or Unlawful Business Carried on upon Insured Property—Fire Risk.** If one is engaged in a business which the law legalizes only upon the performance of certain conditions, an insurance upon such traffic while it continues unlawful, by reason of noncompliance with the statutory requirements legalizing it, would undoubtedly be void,[59] and if at the time of effecting a policy on his stock in trade, and until after the contract of insurance

companies upon which a public use is impressed are subject to legislative interference, and cannot by contract exempt themselves from liability for negligence of their employees: Transportation Co. v. Block, 86 Tenn. 392; Mann v. Western Union Tel. Co., 85 Tenn. 529. The last case decides that a telegraph company cannot by contract absolutely exempt itself from all liability for damages arising from the negligence of its servants.

[57] Heller v. Crawford, 37 Ind. 297. But see note to Myres v. Meinrath, 3 Am. Rep. 371; note to Allen v. Duffie, 38 Am. Rep. 165; Robeson v. French, 45 Am. Dec. 237; 2 Parsons on Contracts, 7th ed., bottom page 898, et seq., and notes.

[58] So held in Commonwealth v. Philadelphia Inquirer (Pa. C. P.), 3 Pa. Dist. R. 742.

[59] Niagara F. Ins. Co. v De Graff, 12 Mich. 124, per Campbell. J.; Armstrong v. Toler, 4 Wheat. (U. S.) 258, and cases cited, and cases under this section.

is completed, a part or the whole of such stock consists of goods in which it is unlawful to traffic except the act be legalized, by conformity with certain statutory requirements, and it has not been so legalized, the policy will not attach, such use being also prohibited therein or the traffic increasing the risk.[60] Cases of the above character rest upon the principle that the property insured, or a part thereof, is used in connection with the carrying on of an unlawful traffic, unlawful until legalized, or used to aid or further the same, and where the intent of the contract substantially effects a violation of or encourages or advances acts in violation of law.[61] But if the insurance be merely upon the property in which such illegal traffic is carried on, or in which such unlawful goods are kept, a question may exist whether the insurance is not within that class of cases where the contract may be valid, even though it is connected with an independent illegal transaction which it is in no way designed to aid or to promote, and it has been so held.[62] But even in a case of this character, where the premises are insured and they are kept solely or partly for carrying on an unlawful business, the question is pertinent whether the insurance is not so closely connected with the illegal or unlawful use that it does in fact operate as a cover for the unlawful purpose, and so taint the contract itself with illegality. If it does tend to assist or abet the wrongdoer in transgressing the laws, and if it does in reality aid or promote the illegal transaction, and encourages an abatement of the laws, there are strong reasons for holding that he insurance is illegal, and not a mere collateral valid contract in which no illegal design enters.[63] Again, the main question is not solely one wheth-

[60] Lawrence v. National Ins. Co., 127 Mass. 557; Johnston v. Union Ins. Co., 127 Mass. 555. Chapter xlix. herein.

[61] Boardman v. Merrimac Ins. Co., 8 Cush. (Mass.) 583. See, also, Clark v. Protection Ins. Co., 1 Story (C. C.), 109; Russell v. Delsvand, 15 Mass. 35; Swanger v. Mayberry, 59 Cal. 91; United States v. Sherman, 1 Pet. (U. S.) 98.

[62] Niagara F. Ins. Co. v. De Graff, 12 Mich. 124.

[63] See Johnson v. Union Ins. Co., 127 Mass. 555; Commercial Mut. Ins. Co., 55 Vt. 526; Patten v. Nicholson, 3 Wheat. (U. S.) 204; Broadman v. Merrimac Ins. Co., 8 Cush. (Mass.) 583; Bartle v. Coleman, 4 Pet. (U. S.) 184; Mutual B. Ins. Co. v. Davis, 12 N. Y. 569; Campbell v.

er the contract is susceptible of legal performance, or that the premises insured are susceptible of lawful use, but whether there has actually been an unlawful use which the policy is intended to actually cover, or would in fact cover if it were admitted to be a lawful use. It is true that if the contract is susceptible of a double construction covering both a lawful and unlawful use or performance, that the law presumes a lawful intent, or at least admits proof of a lawful performance, but if an unlawful use or illegal performance is proven, then the contract will be void.[64] And it is held that noncompliance

Charter Oak Ins. Co., 10 Allen (Mass.), 213. The words of Mr. Duer in relation to contracts of marine insurance are of force in this connection. He says: "The statutory provision, the breach of which discharges the insurers, must bear a direct and immediate relation to the voyage insured. It must operate either by its terms or by a necessary inference as a prohibition of the voyage, where no such connection subsists between the actual voyage and the provisions of the statute, where consequently the relation between the illegal act and the policy is not direct, but remote and incidental, so that neither the design nor tendency of the latter is to aid and promote the commission of the former, and the validity of the contract is not impaired or affected": 1 Duer on Marine Insurance, ed. 1845, 360, sec. 50, et seq.; Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157, per Story, J.; Carruthers v. Gray, 15 East, 35; Warren v. Manufacturers' Ins. Co., 13 Pick. (Mass.) 518, per Wilde, J.; Ward v. Wood, 13 Mass. 539; Bird v. Appleton, 8 Term Rep. 562, per Lord Kenyon, C. J.; Johnson v. Henderson, 11 East, 180. Examine c. xlix, herein.

[64] Waugh v. Morris, L. R. 8 Q. B. 208; Russel v. De Grande, 15 Mass. 35; Haines v. Busk, 5 Taunt. 521; Holland v. Hall, 1 Barn. & Ald. 53; Gill v. Dunlop, 7 Taunt. 193; Thornton v. Lance, 4 Camp. 231. See Brown on Parol Evidence, ed. 1893, p. 61, sec. 34. And as bearing somewhat upon the question involved herein, it may be stated as a general rule that, in other than insurance contracts, if the property concerning which the contract is made is ordinarily susceptible of a lawful use, the contract is not validated by the mere fact that the person contracting to do some matter or thing in or about the property knew that the premises were intended to be applied to an unlawful use, unless the services rendered under the contract were furnished directly for this purpose of aiding or abetting and furthering the illegal act: Maddox v. Thornton, 2 Cranch (C. C.), 260; Tatum v. Kelly, 25 Ark. 209; Lewis v. Davison, 4 Mees. & W. 654; Spurgeon v. McElvaine, 6 Ohio, 442; Tracy v. Talmadge, 14 N. Y. (4 Kern.) 162; Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157, per Story, J.; Michael v. Bacon, 49 Mo. 474; 8 Am. Rep. 138. And the mere fact that a foreign vendor knew that the goods were intended to be smuggled by the purchaser will not of itself avoid a recovery of the contract price; he

by foreign insurance companies with certain statutes in respect to doing business in a state, or concerning the appointment of agents vitiates contracts made by them in such state,[65] although there are numerous decisions otherwise.[66] The keeping and sale of liquor without license is using the premises for an unlawful purpose when the law requires such license.[67] Under the Mississippi code requiring a privilege tax license of a merchant, authorizing the carrying of a stock of goods not exceeding a certain amount, if the stock exceeds such limit the business becomes eo instanti illegal, and if thereafter an insurance is effected on the stock, it is a contract "made in reference to the business" thus illegally "carried on," and is void.[68]

§ 2537. Illegal Use of Property when Susceptible of Legitimate Use—Public Policy.—The fact that insured

must have aided or abetted the act, as in case where he aids in packing the goods for smuggling: Holman v. Johnson, Cowp. 341; Gibson v. Service, 5 Taunt. 433. But if the services rendered are of a character which clearly evidence that they were intended to be rendered in aid and furtherance of the unlawful or prohibited act, or if the statute provides for the doing of certain acts to render the service lawful, and the law is not complied with, the contract cannot be enforced: Badgely v. Beale, 3 Watts (Pa.), 263; Spurgeon v. McElvaine, 6 Ohio, 442; Chadwick v. Collins, 26 Pa. St. 138; De Begnis v. Armstead, 10 Bing. 107; Duke of Brunswick v. Crowl, 4 Exch. 492; The Pioneer, Deady (U. S. D. C.), 72.

[65] Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520; Lamb v. Lamb, 7 Chic. Leg. News, 411; Hoffman v. Banks, 41 Ind. 1; Franklin Ins. Co. v. Louisville etc. Co., 9 Bush (Ky.), 590; Union Cent. L. Ins. Co. v. Thomas, 46 Ind. 44; Haverhill Ins. Co. v. Prescott, 42 N. H. 547; Cincinnati Mut. Assur. Co. v. Rosenthall, 55 Ill. 85; Farmers & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; Roche v. Ladd, 1 Allen (Mass.), 436; Ætna Ins. Co. v. Harvey, 11 Wis. 394; Williams v. Cheney, 8 Gray (Mass.), 206. See sec. 333, herein.

[66] Thornton v. Western Reserve F. Ins. Co., 31 Pa. St. 529; Huntly v. Merrill, 32 Barb. (N. Y.) 626; Columbus Ins. Co. v. Walsh, 18 Mo. 229; The Mamstee, 5 Biss. (U. S.) 381; Provincial Ins. Co. v. Lapsley, 15 Gray (Mass.), 262; Union Mut. L. Ins. Co. v. McMillen, 24 Ohio St. 67; Clay F. & M. Ins. Co. v. Huron Salt etc. Co., 31 Mich. 346. See sec. 333, herein.

[67] Kelly v. Worcester Mut. F. Ins. Co., 97 Mass. 284.

[68] Sun Mut. Ins. Co. v. Searles (Miss. 1895), 18 S. Rep. 544; Miss. Ann. Code, 1892, c. 108.

property susceptible of a legitimate use is used for an illegal or unlawful purpose does not avoid the risk as contrary to public policy.[69]

§ **2538. Illegal Occupation of Insured—Life Risk.**—The fact that the party whose life was insured was engaged in an illegal trade will not of itself deprive the one for whose benefit the policy was effected of the right to recover on the policy, he not having known of such illegal employment, nor having participated therein.[70]

§ **2539. Goods the Importation or Exportation of which are Prohibited.**—Goods the importation or exportation of which are forbidden by the laws of this country cannot form the lawful subject of a contract of insurance here. The contract is vitiated by the illegality to the extent that the court at once that the fact is disclosed will refuse its enforcement, even though the insurer had full information of the character of the risk assured. No tribunal can by its decree impart life to a contract which tends so directly to a subversion of its laws, or which if permitted to stand would only encourage the direct violation of the laws of revenue and trade, but would secure an indemnity to the transgressor. These principles are well settled.[71] And if the traffic in which the ship is to be enagaged is forbidden by the law of this country,

[69] Erb v. German-American Ins. Co. (Iowa, 1896), 67 N. W. Rep. 583 (case on policy on stock of drugs and liquors).

[70] Lord v. Dall, 12 Mass. 115; 7 Am. Dec. 38.

[71] Gray v. Sims, 3 Wash. (C. C.) 276; Russell v. De Grande, 15 Mass. 35; Richardson v. Maine Ins. Co., 6 Mass. 102. See Johnson v. Hudson, 11 East, 180; Ritchie v. Smith, 6 Com. B. 462; Hannay v. Eve, 3 Cranch (U. S.), 242; Holman v. Johnston, Cowp. 341; Cope v. Rowlands, 2 Mees. & W. 149; Catlin v. Bell, 4 Camp. 183; Armstrong v. Toler, 11 Wheat. (U. S.) 258; Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 5, p. 169; 1 Marshall on Insurance, ed. 1810, 55, et seq.; 3 Kent's Commentaries, 5th ed., 262; 1 Arnould on Marine Insurance, Perkins' ed. 1850, *704, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 693; citing Cushing's Laws; Consolidation Act 1876; 39 & 40 Vict., c. 36; 1 Duer on Marine Insurance, ed. 1845, 315, et seq. See U. S. Rev. Stats., sec. 3082; Acts Cong., June 22, 1874, c. 391.

a policy on the ship for the voyage is void, as well also as an insurance covering freight.[72]

§ **2540. Trade Prohibited by Foreign Laws—Effect of Treaties.**—In determining the legality of a contract the courts will not, subject to the exceptions herein noted, consider the prohibitory laws of revenue or trade of a foreign country under the common form of policy, and insurances here in contravention thereof are valid, provided the policy is written with the full knowledge of the intended trade, and also conditioned that such risk is not expressly excepted. But if the contract be against the usual risks, and there is no knowledge of the contemplated breach of the foreign laws of trade or revenue, the underwriters cannot be presumed to have taken the risk of condemnation from breach of the trade laws of such country, unless the voyage be to a place where no legal trade can be carried on, or there are other facts which show that such illegal trading was evidently within the contemplation of the parties.[73] In the application of this rule a distinction should be observed between insurances which contravene merely the laws of revenue and trade of a foreign country and those which are opposed to subsisting treaties between this and foreign countries, since if by such treaty a cer-

[72] Gray v. Irwins, 3 Wash. (C. C.) 276.

[73] Andrews v. Essex F. & M. Ins. Co., 3 Mason (C. C.), 6, 17, per Story, J.; Parker v. Jones, 13 Mass. 173; Lever v. Fletcher, reported in 1 Marshall on Insurance, ed. 1810, 61; Pollock v. Babcock, 6 Mass. 234; Maryland & Phœnix Ins. Co. v. Battlehurst, 5 Gill & J. (Md.) 159; Cook v. Essex Ins. Co., 6 Mass. 122; Gardner v. Smith, 1 Johns. Cas. (N. Y.) 141; Archibald v. Mercantile Ins. Co., 3 Pick. (Mass.) 73; Planche v. Fletcher, Doug. 238; Richardson v. Fire & M. Ins. Co., 6 Mass. 102; McFee v. South Carolina Ins. Co., 2 McCord (S. C.), 503; Blagge v. New York Ins. Co., 1 Caines (N. Y.), 549; Seton v. Delaware Ins. Co., 2 Wash. (C. C.) 175; Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 5, et seq.; 1 Marshall on Insurance, ed. 1810, 60, et seq.; 1 Phillips on Insurance, 3d ed., 657, sec. 1117; 1 Arnould on Marine Insurance, Perkins' ed. 1850, *706, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 693. See Ludlow v. Van Rensselaer, 1 Johns. (N. Y.) 94; Kohn v. Schooner Renaissance, 5 La. Ann. 25; Holman v. Johnson, Cowp. 341; Lightfoot v. Tennant, 1 Bos. & P. 551. But see 3 Kent's Commentaries, 13th ed., *263, *265; Story's Conflict of Laws, 7th ed., secs. 255-57.

tain trade or trade in particular commodities is prohibited, the subjects of each country thereto are bound the same as if by municipal law, and insurances upon voyages in contravention of the treaty are illegal and void.[74]

§ 2541. Exportation Otherwise Legal may become Illegal by Subsequent Execution of Agreement in Evasion of Revenue Laws.—Although the goods may be exported in conformity with the requirements of the laws of the country, yet if in pursuance of an agreement made here prior to the exportation and consummated while the voyage exists as an entire voyage there is a fraudulent evasion and breach of the revenue laws, the contract of insurance is vitiated. If the agreement to evade the revenue laws is made here, it is immaterial at what point of an entire voyage insured it is to be executed. It nevertheless makes the exportation of the goods unlawful.[75] This conforms with the general rule of law that courts will not uphold a mere device for carrying into effect that which the legislature has said shall not be done, nor can one by an indirect and circuitous evasion of the law effect legally that

[74] The Eenrom, 2 Rob. Adm. 6; The Neutralitet, 3 Rob. Adm. 296; 1 Duer on Marine Insurance, ed. 1845, 349, sec. 38. Mr. Marshall says: "Even where the trade insured is to be carried on by British subjects not only contrary to the laws of a foreign state, but contrary also to the express provisions of a treaty to which Great Britain was a party, yet if the insurers subscribe the policy with full knowledge of the nature of the trade, the contract will bind him": 1 Marshall on Insurance, ed. 1810, 60, reporting Lever v. Fletcher, per Lord Mansfield. Mr. Maclachlan (2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 693, note) says this statement of Mr. Marshall's "is an error of long standing": See, also, Id. 697. "The constitution and laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under authority of the United States are declared to be the supreme law of the land, and the judges in every state are to be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding": Const. U. S., art. vi. See, also, Cooley's Constitutional Limitations, 6th ed., 18. "Validity of an insurance in contravention of the laws of a foreign country": Article 21, Amer. Jur., 138 (1839), translated from article by Dr. Lewis Duncker, University-Syndic at Marburg, published in the Archiv fur die Civilistiche Praxis, vol. 21.

[75] Gibeon v. Service, 5 Taunt. 433. See Sturges v. Bush, 5 Day (Conn.), 452; Pond v. Smith, 4 Conn. 297.

which cannot directly be accomplished in the face of a prohibitory law, whether the prohibition be express or implied.[76]

§ 2542. Effect of Prohibitory Statute Imposing Penalty—Collateral Acts.—If a statute prohibits under a penalty the carrying of certain materials on vessels, the noncompliance with such statute by the owners of the vessel does not affect the insurance on the vessel or cargo.[77] So if a statute provides that a certain quantity of water shall be carried on board vessels, and in case of noncompliance that the crew shall have a remedy against the owners and masters, the voyage is not rendered illegal by noncompliance.[78] It will be observed from an examination of the cases that there is a distinction between a statute which, although it contains no prohibitory words, yet by imposing a penalty implies a prohibition, and makes, therefore, a contract concerning the act so impliedly prohibited unlawful and unenforceable,[79] and those cases where it is clearly evident from the enactment that it was not intended to render unlawful the prohibited act, and the statute may reasonably be held to be directory. The whole purpose of the statute is subserved by imposing the penalty, especially so where the statute is intended for the benefit of particular persons having no influence upon the public welfare, nor being founded upon reasons of public policy. In this class of cases the court will construe the contract so as to effect

[76] Brown's Legal Maxims, 7th Am. ed., sec. *489; citing Morris v. Blackman, 2 Hurl. & C. 912, 918; Booth v. Bank of England, 7 Clark & F. 509; Kendall v. United States, 12 Pet. (U. S.) 524, per Mr. Justice Thompson; Hughes v. Stratham, 4 Barn. & C. 187, 193; Monys v. Leake, 8 Term Rep. 415, per Lord Kenyon, C. J.

[77] Sherlock v. Globe Ins. Co., 1 Cinc. (Ohio) 193.

[78] Warren v. Manufacturers' Ins. Co., 13 Pick. (Mass.) 518.

[79] Bartlett v. Viner, Carth. 252, per Lord Holt; Drury v. De Fontaine, 1 Taunt. 136, per Tindal, C. J.; Clark v. Protection Ins. Co., 1 Story (C. C.), 109, per Story, J.; Suart v. Powell, 1 Barn. & Adol. 266, per Lord Tenterden; Swords v. Owen, 43 How. Pr. (N. Y.) 176; 2 Jones & S. (N. Y.) 277; Bensley v. Bignold, 5 Barn. & Ald. 335; De Begnis v. Armstead, 10 Bing. 107; Law v. Hodson, 11 East, 300; 2 Camp. 147; Blachford v. Preston, 8 Term Rep. 89; Fowler v. Scully, 72 Pa. St. 456; 13 Am. Rep. 699; Former v. Legg, 7 Term Rep. 182; The Pioneer, Deady (U. S.), 72; Johnson v. Sutton, Doug. 254; Gallini v. Laborie, 5 Term Rep. 242; Ribbans v. Crickett, 1 Bos. & P. 264.

the purpose contemplated, and will not extend it so as to invalidate the contract itself, and, applying the rule to insurances, the voyage or trade will not be held illegal by reason of noncompliance with the statute.[80] We have already given consideration to the question whether by the violation of some statute expressly or impliedly prohibiting an act the insurable interest is devested at that moment the illegal act is done, or not until seizure or perhaps until forfeiture declared;[81] and where a statute expressly or impliedly prohibits an act, the question arises whether the noncompliance therewith at the inception of the voyage makes the subsequent voyage or trade illegal. In Ocean Insurance Company v. Polleys[82] the register was obtained without conforming to the requirements of the laws of the United States relating thereto, and it was held that the insurance was not avoided thereby. In Clark v. Protection Insurance Company[83] a chain cable was smuggled aboard subsequently to the insurance, and it was held that the infraction of the law was covered by a penalty, and the vessel was not liable to forfeiture for receiving smuggled goods, and that the insurance was not avoided, and also that an insurance on the chain cable was good. In Carruthers v. Gray[84] the insurers were held not released because of the fact that the goods insured were not mentioned in the ship's manifest contrary to the provisions of the statute. In

[80] Clark v. Protection Ins. Co., 1 Story (C. C.), 109; Warren v. Manufacturers' Ins. Co., 13 Pick. (Mass.) 518, and cases cited; Ward v. Wood, 13 Mass. 539; Brown v. Duncan, 10 Barn. & C. 93, per Lord Tenterden. See Falckler v. Ford, 24 How. (U. S.) 322; Pangborn v. Westlake, 36 Iowa, 546; Oneida Bank v. Ontario Bank, 21 N. Y. (7 Smith) 490; Harris v. Runnels, 12 How. (U. S.) 79. See sec. 2168, herein, as to statutes requiring pilot to be employed under penalty for noncompliance. "The same consequence," viz., avoiding the policy, "do not follow from the violation of acts of parliament which, though connected with the trade and navigation of this country, are yet passed for a collateral purpose": 1 Arnould on Marine Insurance, Perkins' ed. 1850, *765, sec. 266; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 697.

[81] Examine sec. 904, herein.

[82] 13 Pet. (U. S.) 157; 14 Me. 141.

[83] 1 Story (C. C.), 109.

[84] 3 Camp. 142; 15 East, 35.

Redmond v. Smith[85] the statute was passed for a collateral purpose, and there was a penalty for noncompliance therewith, and it was held that the voyage was not illegal because of a failure to have shipping articles.[86]

§ 2543. Trade which Would Otherwise be Invalid because Interdicted may be Valid through Necessity.—If a trade with a foreign power be interdicted by an act of Congress, and a vessel is forced by stress of weather into a port of such power, and is obliged to land her cargo and is prevented by that government from reloading, she is not obligated to abandon and seek redress from her own government, but may take a new cargo in exchange therefor, or a cargo purchased with the proceeds of the sale thereof, and the policy is not vitiated by such act; in such case the offense is not intentional. This was so held under the nonintercourse law of 1798.[87]

§ 2544. Contract of Indemnity against Embargo Valid. A contract to indemnify against an embargo which the government of the parties may impose at a future time is not against the policy of the law and is valid.[88]

[85] 7 Man. & G. 457; 13 L. J. C. P. 159.

[86] See Farmer v. Legg, 7 Term Rep. 182. Certain qualifications were required of the master engaged in voyages for slave trading under a penalty upon both master and owners for noncompliance, and the certificate not being in exact conformity with the requirements of the statute, it was held that the voyage was illegal and the policy void. Mr. Duer, who exhaustively considers this question, concludes that "where the prohibited act, whatever may be the nature of the penalty imposed, renders the subsequent voyage or trade illegal, as a necessary consequence it vacates the policy," but he makes the distinction that if no forfeiture is created by the law, it being limited to the punishment of the offender, "the participation or privity of assured is necessary to be proved in order to avoid the policy": 1 Duer on Insurance, ed. 1845, 318, 319, et seq., 377-87. As to what acts regulating trade and navigation were in force in 1887, see 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 695.

[87] Hallett v. Jenks, 3 Cranch (U. S.), 210. See, as to distinctions between a case of this character and excuse for traffic with an enemy, opinion of Marshall, C. J., in above case; Hallett v. Jenks, 3 Cranch (U. S.), 210; The Seyerstadt, 1 Dod. 241; The Catherine Maria, 1 Ed. Adm. 337.

[88] Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 312; Lorent v. South Carolina Ins. Co., 1 Nott & McC. (S. C.) 505; Francis

§ **2545. Effect of Violation of Embargo** A trade carried on in contravention of an embargo is illegal, and an insurance of such trade is void.[89] If the voyage is begun with a knowledge of its being prohibited or illegal, the policy is void, and the policy having attached "at and from," a breach of the embargo is such a violation as to render the subsequent voyage illegal, and release the insurers; certainly so if the violation is followed by seizure.[90]

§ **2546. Cargo Procured with Proceeds of Former Illegal Cargo—Prior Separate Voyage Illegal.**—The fact that the cargo insured is purchased with the proceeds of an illegal cargo exported in contravention of law on an illegal voyage to the port "at and from" which the insurance is effected, the antecedent voyage being separate and distinct from that insured, does not render the insurance illegal and void, even though the ship by her previous illegal commerce was subject to seizure and confiscation; in such case the subsequent voyage cannot be affected by the illegality of the prior separate one.[91] And in case of contraband of war, if the return voyage is separate, distinct, and independent, the illegality of the preceding voyage will not generally attach upon the cargo of the return voyage, although such cargo be the proceeds of the prior illegal one, nor will such illegality attach upon the ship upon a distinct return voyage,[92] al-

v. Ocean Ins. Co., 6 Cow. (N. Y.) 404; McBride v. Marine Ins. Co., 5 Johns. (N. Y.) 299; Simeon v. Bazett, 2 Maule & S. 94, per Lord Ellenborough.

[89] Delinada v. Motteux, reported in 1 Marshall on Insurance, ed. 1810, 82.

[90] Delinada v. Motteux, reported in 1 Marshall on Insurance, ed. 1810, 82; 1 Duer on Marine Insurance, ed. 1845, 351, 352; citing Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 312; McBride v. Marine Insurance Co., 5 Johns. (N. Y.) 299; Walden v. Phœnix Ins. Co., 5 Johns. (N. Y.) 310; Delano v. Bedford M. Ins. Co., 10 Mass. 349, and other cases.

[91] Kemble v. Rhinelander, 3 Johns. Cas. (N. Y.) 130; Bird v. Appleton, 8 Term Rep. 622, reported in 1 Marshall on Insurance, ed. 1810, 74; Bell v. Gibson, 1 Bos. & P. 353, per Butler, J.

[92] The Imina, 3 Rob. 168, per Sir W. Scott; The Nancy, 3 Rob. 127; Carrington v. Merchants' Ins. Co., 8 Pet. (U. S.) 521, per Story, J.;

though it is held that the ship is liable to seizure in port after the determination of the entire voyage;[93] but none of the cases extend the doctrine beyond the completion of the entire voyage, so as to taint subsequent separate and distinct voyages with the illegality, and undoubtedly an insurance on such new and distinct voyage would be legal. So where the trade is with an enemy, the ship must be taken during the voyage, or during some part of a continuous and entire voyage during which the offense is committed; it is not enough, however, that the voyage may be separated into parts. The court will consider its true character, and if the trade is circuitous and the voyage entire, or if the continuity of the voyage is broken by the master's making an intermediate trade, the vessel is nevertheless subject to confiscation.[94] The rule is deduced from these cases that a prior illegal voyage will not invalidate an insurance on a subsequent legal voyage which is separate and distinct from the prior, and in no way constituting with it an entire continuous voyage.[95]

§ 2547. Trade with Enemy—Prior Valid Character of Cargo.—If the importation of goods is illegal, because of trade with an enemy, the prior valid character of the goods constituting the illegal cargo, or of the funds with which they are purchased, does not validate the offense of trading with the enemy or make the goods the less subject to the illegality.[96] This rule does not, however, preclude proof that the property

The Christiansberg, 6 Rob. 381, per Sir Wm. Scott; The Rosalie & Betty, 2 Rob. 348; The Jonge Pieter, 4 Rob. 79, per Sir Wm. Scott; Kent's Commentaries, 12th ed., *151, n. See Wheaton's International Law, 6th ed., 568.

[93] The Caledonian, 4 Wheat. (U. S.) 100.

[94] The Joseph, 8 Cranch (U. S.), 454; The Jonge Pieter, 4 Rob. 79, 84, per Sir Wm. Scott.

[95] See, also, Sewall v. Royal Exch. Assur. Co., 4 Taunt. 856; Muller v. Thompson, 2 Camp. 610; Clark v. Protection Ins. Co., 1 Story (C. C.), 126, per Story, J.

[96] The Lady Jane, cited 1 Rob. 202; The Juffrow Louisa Margaretta, cited in 1 Rob. 203; The Rapid, 1 Gall. (C. C.) 295; 9 Cranch (U. S.), 132; Potts v. Bell, 8 Term Rep. 548; The Alexander, 8 Cranch (U. S.), 169.

seized is innocent, and is owned by a neutral who has no share nor interest in the illegal transaction.[97]

§ 2548. Where Prior Part of Same Voyage is Illegal. It is declared by eminent authority that it is exceedingly difficult to distinguish between an illegality in a former voyage and that in a prior part of the same voyage where the policy covers only the part which is legal.[98] The rule seems to be, however, that if there is such a legal infirmity at the inception of a voyage as to make it illegal, and the voyage, although it consists of separate or successive parts, is nevertheless an entire and continuous one, the original illegality extends to and taints every part of the subsequent voyage, and makes the entire voyage illegal.[99]

§ 2549. Illegality after Risk Attaches "at and from." If the risk on the ship has actually attached under a policy "at and from," and is so far tainted with the illegality that the insurer could have then avoided the policy on this ground, the subsequent voyage is affected with such illegality to the extent of avoiding the insurance thereon.[100]

[97] See The Franklin, 6 Rob. 127.

[98] Clark v. Protection Ins. Co., 1 Story (C. C.), 126, per Story, J. See last section.

[99] Bird v. Pigon, 2 Selw. N. P. 991, 1009 (Phil. ed. 191), 9th ed., per Lord Kenyon; Camden v. Anderson, 6 Term Rep. 723; 1 Bos. & P. 272; 1 Duer on Insurance, ed. 1845, 336, sec. 27.

[100] Bird v. Appleton, 8 Term Rep. 562. We have cited this case in support of the rule in the text, and think it does support it to the extent specified. The risk had certainly attached on the ship and she had on board, one illegal cargo from the voyage to the place "at." She however disposed of this cargo before the ship sailed, and the new cargo was entirely distinct and separate. In the argument the policy on the ship was abandoned by plaintiff's counsel because the illegal goods were on board "at." The immediate voyage insured could not be severed, and the whole was an illegal adventure. Lord Kenyon said: "It is now very properly admitted that the policy on the ship must be abandoned, because during part of the time that the parties intended that the policy should attach . . . . there was something illegal in the transaction," but the policy on the goods was upheld under the rule stated under section 2544, herein. This case is reported in 1 Marshall on Insurance, ed. 1810, 74.

§ 2550. Where Subsequent Part of Same Voyage is Illegal.—We believe that we may fairly deduce from the authorities the rule that if a subsequent illegality arising in the course of the same voyage be in furtherance or a necessary consequence or a consummation of a proven illegal intention existing at the inception of the voyage, this is such an infirmity in a part of an integral voyage that the whole voyage is rendered illegal. But if there is no illegal intention at the inception of the voyage, and the voyage exists as a valid one until the illegality arises, the rule does not apply.[101] It is declared by eminent authority in this country that the voyage should be at the commencement wholly or in part illegal as to trade and objects in order to avoid an insurance, and in the same case the same judge further declares that a

[101] Wilson v. Marryatt, 8 Term Rep. 31; 1 Bos. & P. 430, as reported in 1 Marshall on Insurance, ed. 1810, *68; Sewell v. Royal Exch. Assur. Co., 4 Taunt. 855; Gill v. Dunlop, 7 Taunt. 193; 1 Duer on Insurance, ed. 1845, 343, sec. 31. It is said by Mr. Justice Lawrence that "in order to render the insurance illegal the illegality should exist during the course of the voyage insured": Bird v. Appleton, 8 Term Rep. 562. And it seems to be the rule in England that any illegality at the commencement or in the course of the voyage makes it illegal: 1 Arnould on Marine Insurance, Perkins' ed. 1850, 702, *699; 2 Arnould on Marine Insurance, Maclachlan's ed. 1886, 688, 689; citing Wilson v. Marryatt, 8 Term Rep. 31, 46, per Lord Kenyon; Bird v. Pigon, 2 Selw. N. P. 1000 (Phil. ed. 191). Lord Kenyon says: "I admit that if there had been any infirmity in any part of the integral voyage it would have made the whole illegal, so that the assured could not recover upon a policy or any part of it." But he also declares in the same case, referring to the intention existing at the commencement of the voyage: "Everything, therefore, relating to these different plans, though a fair subject of investigation and discussion, may now be laid out of our consideration, as it does not appear what precise voyage the parties had in contemplation at the inception of the voyage from America. Then if the voyage insured be not infected by what was done in America, it was a legal voyage"; and Mr. Marshall, who reports the case in which this language occurs, digests this portion of it so as to refer the illegality which would afford a basis for avoiding the contract to the commencement of the risk: Wilson v. Marryatt, 8 Term Rep. 31; 1 Bos. & P. 430, as reported in 1 Marshall on Insurance, ed. 1810, 68. Mr. Justice Story refers to the first above quoted part of Lord Kenyon's remarks as a "mere obiter dictum" substantially overturned by a subsequent decision: Clark v. Protection Ins. Co., 1 Story (C. C.), 109, 126, per Story, J., the subsequent case referred to being Bird v. Appleton, 8 Term Rep. 562.

subsequent illegality will not affect an insurance upon an originally valid voyage, so far as concerns losses on property not tainted with such illegality, though connected with the independent illegal transaction, and that a mere liability to forfeiture will not avoid the insurance or prevent a recovery for a loss by an independent peril.[102] Mr. Duer, however, doubts the soundness of this decision, in that it implies that a subsequent illegality does not avoid the contract from the time it arises, and is of opinion that a subsequent illegality not connected with an original illegal intent avoids the insurance from the time it occurs.[103] We incline, however, to the belief that the better opinion favors the rule stated by Mr. Justice Story in all cases.[104]

§ **2551. Effect of Partial Illegality upon Contract.**— The question as to the effect of a partial illegality upon the contract is one of much difficulty, and concerning which no certain rule can be stated. If it be assumed that the contract is entire, the way to a solution is comparatively clear, but there arises at once the question, When is the contract entire so that the rule "void in part void in toto" will apply? In fire risks, where real and personal property is covered by one contract, or there are several distinct and separate buildings insured, or several distinct and separate articles of personal property, or there is a separate valuation, the authorities are conflicting whether the risk is entire or severable. In fire risks, however, the point arises chiefly under conditions requiring disclosure as to title or encumbrances, or of circumstances relating to the condition, situation, or value of the

[102] Clark v. Protection Ins. Co., 1 Story (C. C.), 109, per Story, J.; Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157. See secs. 904, 2507, 2538, herein.

[103] 1 Duer on Insurance, ed. 1845, 344, 345, secs. 31, 32. See Chalmers v. Bell, 3 Bos. & P. 604.

[104] "If the contract is on its face legal, and the passage or adventure contracted about is legal, the weightier authority seems to be in favor of the validity of the contract, though the subject contracted about may be on one side or the other precedent or consequent to something not sanctioned by the law": 1 Phillips on Insurance, 3d ed., 142, sec. 231. See Virginia F. & M. Ins. Co. v. Feagin, 62 Ga. 575.

property, or under warranties or stipulations in the policy, or concerning alienation, other insurance, and the like, so that we have in these risks an element which affects the construction, and that is whether the intention of the parties was to extend the condition in all its force to the entire contract and the entire property covered, and in some cases the condition itself is so worded as to extend specifically to all or any of the property. We have, however, considered elsewhere this question in its relation to fire risks.[105] The question whether the contract is entire or divisible would undoubtedly be eliminated if the illegality is such as to pervade the whole contract, and the same would be true in case of the illegal act of assured in shipping prohibited goods. Beyond this point it is equally as difficult to formulate a rule in marine as in fire risks concerning what is an entire and what a divisible contract, although it would seem that the courts will not, on general principles of construction, extend the rule so as to forfeit the rights of the assured, unless the circumstances are such as clearly warrant it, and if in marine policies there are different articles, or specific and different kinds of property separately valued, a reasonable construction would justify a finding that the contract is so far divisible that an illegality as to part may exist, and the property nevertheless be valid as to part, provided the ownership does not make the insurance illegal; that the illegality does not pervade the whole contract. The following rule may, however, be safely stated as to marine risks: If a party insured goods together generally under one policy, the risk being entire, as where they are included in one valuation, and some of the goods are illegal and the voyage is void as to them, the whole contract is illegal and void.[106]

§ 2552. Last Rule Qualified where Illegality Removed as to Part of Cargo by Permission of Government. The illegality which would otherwise exist as to the entire car-

[105] See secs. 1931, 2253-56, herein.

[106] Parkin v. Dick, 11 East, 502; 2 Camp. 221, per Lord Ellenborough. See Camelo v. Britten, 4 Barn. & Ald. 184. See Shiffner v. Gordon, 12 East, 296, per Lord Ellenborough; The Staadt Embden, 1 C. Rob. 31. See Gordon v. Vaughan, 12 East, 302, n; The Jonge Tobias, 1 C. Rob. 329.

go may be removed as to part of the cargo where such part is lawfully carried under express permission of the government; as in case of goods the lawful carrying of which requires a government license, here the license will protect so much of the cargo as it covers, and that part which is in excess will be separated, and the policy will be valid as to the lawful part, even though all the goods are those of the same shipper covered by the same policy.[107] This rule rests upon the grounds that the goods protected by the license are lawfully shipped and cannot be forfeited, and that the excess can be easily repaired.

§ **2553. Partial Illegality—Shipowners under Same Policy.**—If an insurance be effected under one policy on account of all the owners of the ship, it may be stated as a general rule that the contract is so far entire that an illegality at the inception of the voyage as to one of the owners affects all the owners with the consequent invalidity.[108]

§ **2554. Partial Illegality—Insurance by Common Agent Covering Goods of Hostile and Neutral Owner.**—Where the goods of hostile and neutral owners, between whom there is no common or joint interest, are insured by a common agent in one policy, there being no fraud or consent thereto, or other act of participation separate and distinct, the mere act of the agent in effecting such a policy does not extend the illegality attaching to the hostile goods to those which are neutral so as to avoid the insurance thereon.[109]

[107] Keir v. Andrade, 6 Taunt. 498; Shiffner v. Gordon, 12 East, 296. See The Jonge Clara, 1 Edw. Adm. 371. See sec. 1818, herein. The decision itself in Keir v. Andrade, 6 Taunt. 498, has, however, been subjected to both adverse and favorable criticism; 1 Duer on Marine Insurance, ed. 1845, 390-93, adversely criticised, although he says, "It were indeed to be wished . . . . that the decision in Keir v. Andrade could be sustained"; 1 Phillips on Insurance, 3d ed., 144, sec. 233, who says, "The rule adopted by that court is certainly recommended by very strong equitable considerations." See Clark v. Protection Ins. Co., 1 Story (C. C.), 109, per Story, J.; Piesehell v. Allmitt, 4 Taunt. 791, per Gibbs, C. J.

[108] Clark v. Protection Ins. Co., 1 Story (C. C.), 109.

[109] Hagedorn v. Bazett, 2 Maule & S. 99, per Lord Ellenborough.

§ 2555. Effect of Illegal Employment of Ship where Neutral Goods Transported Therein.—The illegal employment of the ship in transporting enemy's goods will not invalidate an insurance upon goods of a neutral transported thereon.[110]

§ 2556. Goods of Several Owners under Same Policy Effected by Common Agent.—The mere accidental circumstance of several owners having employed one common agent, and that he effects a policy covering their interests, does not communicate to the others the vice belonging to the property of one of the assured where there is no common or joint interest or partnership in the whole subsisting in the different owners, and no fraud; that is, the unlawfulness which would avoid one separate interest will not extend to and invalidate the interests of those others who have in no way a common interest, and who have not consented to or participated in the unlawful act through the common agent or otherwise. But it is said that if consent had been given to the employment of a common agent, the rule might be otherwise, and if the interests of the owners be joint and connected, or if they have a common interest in the loss or gain which may arise, the illegality which affects one affects all.[111]

§ 2557. Transportation by Same Vessel—Lawful and Unlawful Goods.—If unlawful goods belonging to one owner are transported by the same vessel on which are lawful goods belonging to another owner, and the lawful goods are covered by a separate and distinct policy, the illegality of the voyage will not of itself extend to and avoid the policy on the lawful goods of the innocent owner.[112]

[110] Barker v. Blakes, 9 East, 283; Visger v. Prescott, 5 Esp. 184.

[111] Hagedorn v. Bazett, 2 Maule & S. 100, per Lord Ellenborough. In this case the policy was on goods thereafter to be valued, the hostile owner was interested one-sixteenth and the neutral one-fourteenth, but they were separately interested in the goods and the contract could be disturbed: Story v. Protection Ins. Co., 1 Story (C. C.), 109.

[112] The Jonge Clara, 1 Edw. Adm. 371, per Sir Wm. Scott; Pieschell v. Allmitt, 4 Taunt. 791. Whether, in cases where the assured knows

§ 2558. Effect of Intention to do Illegal Act.—It may be stated as a general rule that the mere intention to do an illegal act which would if done avoid the policy is not of itself alone sufficient to invalidate the contract, the intent never having been consummated by any act; especially so where the actual subject matter described in the policy is not per se illegal, and the contract itself contains no stipulation which evidences an intent to perform an illegal act, and such absence of illegal intent may be shown where the facts are such as to warrant an explanation.[113] So in case of an implied exclusion arising from the acts of government, such implied exclusion may, it is held, be rebutted by the facts and circumstances of the case.[114] But if the ultimate purpose of the voyage is evidenced at the outset by some act done in furtherance thereof and in preparation therefor, the voyage is then illegal, even though the act done is not the act prohibited.[115]

§ 2559. Trade with Enemy, Absence of Intent to Violate Law no Excuse.—Where either ship or goods are engaged in illegal traffic with the enemy, it is no excuse that there was no intent to transgress the law, or even that the illegal acts were done in good faith.[116]

or ought to know that his goods are to be transported by the same vessel with unlawful goods, he ought to disclose such facts. See secs. 1807, 1818, herein.

[113] Clark v. Protection Ins. Co., 1 Story (C. C.), 124, per Story, J.; Waters v. Allen, 5 Hill (N. Y.), 421; Fontaine v. Phœnix Ins. Co., 11 Johns. (N. Y.) 293; Holland v. Hall, 1 Barn. & A. 153; The Abbey, 5 Cher. & Rob. 251, per Sir Wm. Scott; Sewell v. Royal Exch. Assur. Co., 4 Taunt. 855; Gill v. Dunlop, 7 Taunt. 204.

[114] Simeon v. Bazett, 2 Maule & S. 94.

[115] Lubbock v. Potts, 7 East, 449. Even in the slave trading cases there must be some evidence of a criminal intent to employ the vessel in the illegal trade, shown by the preparation or fitting out, and the vessel could be seized so soon as the intention to sail was apparent, such unlawful intent existing: The Slavers, 2 Wall. (U. S.) 358; The Emily and Caroline, 9 Wheat. (U. S.) 381; Strolum v. United States, Taney (C. C.), 413; United States v. Gooding, 12 Wheat. (U. S.) 460; The Plattsburg, 10 Wheat. (U. S.) 133.

[116] The Hoop, 1 Rob. 196, per Sir Wm. Scott; The Joseph, 8 Cranch (U. S.), 451; 1 Gall. (C. C.) 545; The Vriendschaft, 4 Rob. 99.

§ 2560. When Possibility of Executing Illegal Intention is Removed.—Where the possibility of executing the intention to trade with the enemy is removed by the intervention of peace or some cause which makes the country no longer enemy's country, the crime of trading with the enemy not being consummated at the time, the intent of itself is not punishable as a crime.[117] This rule applies to a case of an intent to proceed to a blockaded port where the blockade has ceased.[118] The rule, however, would undoubtedly not extend to and validate an insurance which had been effected prior to the happening of such an event, where the voyage was commenced with the intent to do the illegal act; for, as we have seen, a voyage which is illegal in its origin and inception is void where some act is done, such as commencing in furtherance of the intent, even though the act be not the one prohibited.[119]

§ 2561. Insurance upon a Cartel Ship while Employed as Such.—As the employment of a vessel as a cartel ship entitles her to protection under the law of nations, an insurance thereon would undoubtedly be valid, but inasmuch as such vessels may not engage in trade with a belligerent, the doing of such act would logically, because of the consequent forfeiture of her privileges and liability to confiscation, render the insurance void.[120]

§ 2562. Insurance to Ports some Hostile some not.—If an insurance be to port or ports, some of which are hostile and at war and others not, the law implies an exception in favor of the nonhostile ports, and the policy is prima facie valid;[121] although it may be proven in such case as a defense

[117] The Abbey, 5 Rob. 224. See The Trende Sostre, 6 Rob. 390, n.; The Imina, 3 Rob. 167.

[118] The Leisette, 6 Rob. 390.

[119] See sec. 2558, herein.

[120] See The Daifjie, 3 Rob. 139; The Venus, 4 Rob. 355; The Mary, 5 Rob. 200; La Glorie, 5 Rob. 192.

[121] Wright v. Welbie, 1 Chitty, 49. See sec. 2506, herein. See Blackburn v. Thompson, 3 Camp. 61; Johnson v. Greaves, 2 Taunt. 344.

to the policy that the voyage was intended and made to such interdicted port.[122]

§ 2563. **Contract Excepting Interdicted Port Unlawful.**—If a port is interdicted by the laws of this country, it is not competent to stipulate an exception of such interdicted ports; such a contract is unlawful.[123]

§ 2564. **Subject of One or Two or more Allied Powers may not Trade with Common Enemy.**—The rule which prohibits trading with an enemy makes illegal the trade of a subject of one or two or more allied powers with the common enemy.[124]

§ 2565. **Trade with Port Occupied by Enemy's Forces—Power of Government to Determine what are Hostile Relations.**—Acquisitions of territory made during the war, and of which the conqueror retains possession and control, are, as a general rule, a part of his domain for every commercial and belligerent purpose, although they are not permanent possessions until confirmed by treaty.[125] Although during the time of the Berlin and Milan decrees the English court asserted the principle that it is within the power of a state to determine the relations sustained by it to other countries, and that courts will be bound thereby and will recognize the national character thus established, and declared that the fact that a trade is carried on with a port occupied by enemy's forces does not make it illegal where the government where the insurance is made does not deem it expedient to pronounce such as hostile, and to enforce against the coerced government the rigors of war, preferring to consider such port friendly or neutral rather than hostile; especially where its commerce is attempted to be excluded by decrees not in conformity with the law of nations, and insurances covering a

[122] Russell v. De Grande, 15 Mass. 35.

[123] Russell v. De Grande, 15 Mass. 35.

[124] The Nayade, 4 Rob. 251; The Eenhigheid, 1 Rob. 210.

[125] Thirty Hogsheads of Sugar v. Boyle, 9 Cranch (U. S.), 191, per Marshall, C. J.

vessel to such ports have been declared legal.[126] So the acts of the executive branch of the government in declaring a fact concerning the sovereignty of any island or country concludes the judicial department, and excludes the question whether such act of the executive is right or wrong, otherwise there would be constantly recurring and irreconcilable differences between these two departments upon questions of foreign jurisdiction; and, therefore, where this government had refused to recognize the sovereignty of Buenos Ayres and extending to and including the Falkland Islands, and a vessel which had proceeded to those islands on a sealing voyage, for which she was insured, was seized for an alleged violation of the law of Buenos Ayres in fishing there, it was held that the insured was not bound to regard unlawful threats of any individual assuming such unrecognized authority, and that the insurers were liable, and that the master had the right in behalf of his owners, and in the exercise of a proper and reasonable discretion, to persist in asserting and maintaining a national right common to citizens of this country.[127]

§ 2566. **Illegality to which Insurer is in Privity may Affect his Rights.**—It is not competent for the owner to stipulate contrary to express or implied prohibitory laws affecting the legality of the trade or voyage, and if he does so he may not recover his premium. This rule also applies to those cases where proof of the knowledge or privity of the insurer in the illegality depends upon extrinsic evidence.[128]

§ 2567. **Goods Shipped to Neutral Port.**—The fact that goods intended for the enemy are first shipped to a neutral

[126] Hagedorn v. Bell, 1 Maule & S. 459; Miller v. Thompson, 2 Camp. 610; Donaldson v. Thompson, 1 Camp. 429; Johnson v. Greaves, 2 Taunt. 344. See The Manilla, 1 Edw. Adm. 1; Gelston v. Hoyt, 13 Johns. (N. Y.) 587; Blackburne v. Thompson, 15 East, 81; 3 Camp. 61; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 730, *728, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 144, 704-06.

[127] Williams v. Suffolk Ins. Co., 13 Pet. (U. S.) 415; affirming 3 Sum. (C. C.), 270. See Rose v. Himely, 4 Cranch (U. S.), 272.

[128] Russel v. De Grande, 15 Mass. 35; Gray v. Sims, 3 Wash. (C. C.) 276; Craig v. United States Ins. Co., 1 Pet. (U. S.) 417.

port does not of itself legalize the trade where it is proposed to forward them thence to the enemy, even though the goods are unladen, and the mode of conveyance thence to the ulterior destination makes no difference, and inasmuch as the legality of the voyage is referred to the commencement thereof where such ulterior unlawful destination was then intended,[129] any insurance covering such voyage would necessarily be invalid. But a case of this character differs from one where a neutral is resident at the time of a country in the occupation of the enemy, for in such case goods are insurable although consigned to such neutral to be delivered to him at a neutral or friendly port.[130]

§ **2568. Insurances on Contraband of War.**—If in time of war between this country and another goods which are contraband of war are sent by a neutral to aid the enemy, they are not capable of a valid insurance here.[131] But so far as a neutral is concerned an insurance on contraband goods may validly be made and enforced in the neutral country, for it is not, with respect to the neutral, an illegal commerce, although the goods may be subject to seizure and confiscation by a belligerent.[132] So it is held that "contraband goods of war" do not vitiate a policy warranted to be on goods that are "lawful." The insured are not bound to disclose that the goods insured are "contraband of war."[133] When it is understood by the parties that the voyage is illicit by the laws

[129] The Jonge Pieter, 4 Rob. 79, per Sir Wm. Scott. Examine Wilson v. Marryatt, 8 Term Rep. 36; 1 Bos. & P. 142.

[130] Bromley v. Hesseltine, 1 Camp. 75.

[131] 1 Marshall on Insurance, ed. 1810, 81a; 1 Duer on Marine Insurance, ed. 1845, 623, 642, et seq. See Gibson v. Service, 5 Taunt. 433.

[132] The Santissima Trinidad, 7 Wheat. (U. S.) 283, per Story, J.; Richardson v. Marine Ins. Co., 6 Mass. 102; Bowne v. Shaw, 1 Caines (N. Y.), 489; Harratt v. Wise, 9 Barn. & C. 712; Rhodes v. Hunter, 2 Hud. & B. 581; Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 5, p. 170. See discussion of this subject in 1 Duer on Marine Insurance, ed. 1845, 750, et seq. Examine Acts Congress 1794, reenacted 1818.

[133] Seton v. Low, 1 Johns. Cas. (N. Y.) 1. See Rhinelander v. Juhel, 2 Johns. Cas. (N. Y.) 120, 487, and note. Comments on these two cases; 3 Kent's Commentaries, 5th ed., 268.

of the country to which the vessel is destined, the warranty against contraband goods is to be extended to such goods only as are contraband of war, not such as are contraband by the laws of that country,[134] or to contraband as distinguished from contraband of war.[135]

§ **2569. What Articles Contraband of War.**—The term "contraband of war" has reference to the existence of war.[136] Outside of those international treaties which settle what articles are contraband of war,[137] it is difficult, if not impossible, to precisely specify them. It is not merely the fact that the goods may aid the enemy. It is always undoubtedly a pertinent inquiry whether there is a breach of that strict impartiality which a neutral nation is bound to observe, and whether the neutral has rendered aid to one belligerent to the detriment of the other by furnishing him goods or articles which are intended clearly to subserve the purposes of war, and to this end the character of the goods themselves in certain cases are peculiarly indicative of the intent. Of this class are arms, ammunition, and other implements and munitions of war of every description, or articles which may immediately be used for the purposes of war by land or naval forces. So ships for war, materials for shipbuilding, and naval stores have been declared contraband of war, and sometimes, though not generally, provisions have been held such, and contributions not designed to aid hostilities, but in good faith, and to relieve distress of a belligerent, are held not a breach of neutrality; and augmenting the armament of belligerent ships of war is an offense against neutrality, although making repairs is not necessarily so. Commodities which are supplied one neutral

[134] Vandervoort v. Smith, 2 Caines (N. Y.), 155.

[135] Compare Cucullu v. Louisiana State Ins. Co., 5 La., N. S., 464; 8 La., O. S., 613.

[136] Wilbraham v. Wartnaby, 1 Lloyd & W. 144; 8 L. J. K. B. 255.

[137] In the first commercial treaty between this country and France contraband goods were defined as solely munitions of war: Schuyler's American Diplomacy, 368. So also does the Ordonnance of Louis XIV of 1681. In the treaty of 1794 between this country and Great Britain materials for ship-building were declared contraband except unwrought iron and fir planks. See United States Statutes at Large for treaties.

may be supplied another, even though useful in war. In cases of doubt where the articles are susceptible of a civil use as well as a warlike one, the character of the port of destination has been deemed important, although not a certain test, and where the goods are not adapted to warlike uses, the test does not apply. So goods which might otherwise partake of the character of contraband of war are not such when excepted by particular treaties.[138] So goods destined to supply the fleet of one belligerent are contraband of war.[139] But the above rule does not preclude shipping goods to supply the forces of the shipper's own country, although destined for an enemy's port, where there is reasonable ground for belief

[138] In the English cases cited herein it will be observed that certain of the decisions determine whether particular articles used in ship-building at the time of wooden ships of war were contraband. The chief value of these decisions depends, however, at the present day, upon such of the principles underlying them as are in force here upon the point that articles are contraband of war when intended to aid one belligerent to the detriment of another, etc., as stated in the text: The Richmond, 5 Rob. 290; The Staadt Embden, 1 Rob. 26; The Endraught, 1 Rob. 25; The Betty Carthcart, Bee (U. S.), 292; 4 Opin. Atty. Gen. 336 (violation of neutrality); The Apollo, 4 Rob. 158; The Neptunus, 3 Rob. 108; The Gute Gessellschaft, 4 C. Rob. 94; The Evert, 4 Rob. 554; The Twee Juffrowen, 4 Rob. 242; United States v. Graffin, 3 Wash. (C. C.) 65; The Charlotte Kaltzenburg, 5 Rob. 305; The Steamship Frosida, 4 Ben. (U. S.) 452; Moodie v. The Brothers, Bee (U. S.), 76; Marssonere v. Keating, 2 Gall. (C. C.) 325; Nostra Signora, 5 Rob. 97; The Brutus, 5 Rob. 325; De Wutz v. Hendricks, 9 Moore, 586; The Sarah Christina, 1 Rob. 241; The Richmond, 5 Rob. 325; The Commercen, 1 Wheat. (U. S.) 382; 2 Gall. (C. C.) 264; The Gran Para, 7 Wheat. (U. S.) 486; The Harbet, 2 Rob. 182; The Zelden Rust, 6 Rob. 93; United States v. Quincy, 6 Pet. (U. S.) 445; The Jonge Margaretha, 1 Rob. 196; The Edward, 4 Rob. 68; Neutrality Law, 13 Opin. Atty. Gen. 541. Examine, generally, Abbott on Shipping, 6th Am. ed., 347, et seq.; Wheaton's International Law, 6th ed. 535, 546, 551, et seq.; Hall's International Law, ed. 1880, 564, 565, 578-83, et seq.; Davis' International Law, ed. 1887, 336-365; Walker's International Law, ed. 1893, 433, 446, 506-08, 510-12; 2 Halleck's International Law, ed. 1861, c. 24; 3 Geneva Award, Rep. St. Dep., pt. 1, 11, 49, 74; 1 Arnould on Marine Insurance, Perkins' ed. 1850, *736, *741; 2 Arnould on Marine Insurance, Maclachlan's ed., 1887, 708-12; 1 Duer on Marine Insurance, ed. 1845, 623-43; 3 Vattel on the Law of Nations, sec. 104.

[139] The Commercen, 1 Wheat. (U. S.) 388; 2 Gall. (C. C.) 264; Malsonarie v. Keating, 2 Gall. (C. C.) 325.

that they are in possession, or there is actual knowledge of such fact, and an insurance effected in the shipper's country on such goods is valid.[140]

§ 2570. Definition of License and Authority Conferred Thereby.—"License" means permission or authority, and where a license is granted by government to do any particular thing, it is a privilege or authority to do that thing, and if a license is granted by the proper authority having power to grant it, it transfers to the grantee the right to do whatever it purports to authorize, and transfers to him all the rights which the grantor can transfer to do what is within the terms of the license.[141] So that a trade which is otherwise unlawful may be so far legalized by act of government in granting a license for its conduct and prosecution that an insurance thereon is valid where the traffic is protected by the license. This last principle runs through all the cases.

§ 2571. By What Authority License Granted.—It is undoubtedly within the power of government, where it has by declaration of war or by statute impliedly or expressly prohibited traffic of a certain character, or has otherwise limited it, to qualify such prohibition and exempt persons or property from the operation thereof, by granting a license to such persons or privileges as to trade. These principles are not disputed.[142] The power to grant licenses is vested in Congress and in the President. So certain officers in command for the needs of their forces may license such trading with the sanction of the government.[143] And in cases of a traffic, such as

[140] See Calhoun v. Insurance Co. of Pennsylvania, 1 Binn. (Pa.) 293; Sperry v. Delaware Ins. Co., 2 Wash. C(. C.) 243. See sec. 2558. See c. xlvii, herein, as to breach of blockade.

[141] Gibbons v. Ogden, 9 Wheat. (U. S.) 1. The text is substantially the language of Marshall, C. J.

[142] 1 Arnould on Marine Insurance, Perkins' ed. 1850, *731; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 706; 1 Phillips on Insurance, 3d ed., 147, sec. 243. The common law permits the sovereign to grant a license: Vandyke v. Whitmore, 1 East, 475. See sec. 293, herein.

[143] As to power of Congress to regulate commerce, see sec. 2506, herein; Rev. Stats. U. S., 2d ed., p. 1031, sec. 5306; Davis' International Law, ed. 1887, 240; Hall's International Law, ed. 1880, 478.

intoxicating liquors, the power of Congress to regulate commerce does not exclude the regulations by the state, except so far as they may conflict with the regulations established by Congress.[144] Sailing under an enemy's license is illegal,[145] and an agreement that such a license should be on board is unlawful and the policy void;[146] although where the vessel was bound to a neutral port the having an enemy's license was held not to avoid the insurance.[147]

[144] See Cooley's Constitutional Limitations, 6th ed., 716, et seq. See sec. 2540, herein.

[145] Craig v. United States Ins. Co., 1 Pet. (C. C.) 410; The Anadone, 2 Wheat. (U. S.) 143; The Fanny, 9 Cranch (U. S.), 191; The Julia, 8 Cranch (U. S.), 181; 1 Gall. (C. C.) 605; The Hiram, 1 Wheat. (U. S.) 440; The Aurora, 8 Cranch (U. S.), 203.

[146] Ogden v. Baker, 18 Johns. (N. Y.) 87; Colquhoun v. New York F. Ins. Co., 15 Johns. (N. Y.) 352.

[147] Hayward v. Blake, 12 Mass. 176; Bulkley v. Derby Fishing Co., 1 Conn. 571; Craig v. United States Ins. Co., 1 Pet. (C. C.) 410; Perkins v. New England M. Ins. Co., 12 Mass. 214. The rule, however, is that first stated. General rules covering construction, legality and effect of licenses in marine cases under decisions rendered under the licensing system: Trading without a license where one is required, is invalid: Potts v. Bell, 8 Term Rep. 548; Vandyke v. Whitmore, 1 East, 475. See sec. 2531, herein. It was formerly held that licenses must be strictly construed: The Cosmopolite, 4 Rob. 11, per Sir Wm. Scott; The Goode Hook, 1 Edw. 428, per Sir Wm. Scott; The Juno, 2 Rob. 117, per Sir Wm. Scott; although subsequently they received a more liberal construction: Flindt v. Scott, 5 Taunt. 693; reversing s. c. 15 East, 525; 1 Duer on Marine Insurance, ed. 1845, 594, et seq., sec. 37. If an alien enemy has a license to trade, this legalizes the insurance: Wells v. William, 1 Salk. 43; Kensington v. Inglis, 8 East, 273; Conway v. Gray, 10 East, 536; Usparicha v. Noble, 13 East, 332; De Tastet v. Taylor, 4 Taunt. 233. See Clark v. Morey, 10 John. (N. Y.) 69. A license can only be used by the persons to whom it was intended to be granted: Robertson v. Mooris, 5 Taunt. 725; Feize v. Thompson, 1 Taunt. 122; The Jonge Johannes, 4 Rob. 263; Barlow v. M'Intosh, 12 East, 311; and it is not transferable unless it appears so on its face: Feize v. Thompson, 1 Taunt. 121. See cases last cited. Although it may be granted to one by name on behalf of himself and others: Rawlinson v. Janson, 12 East, 223. It may, however, be negotiable, either expressly or where the nature and objects of the grant raise impliedly such permission, as where the trade itself rather than the persons is intended to be covered: The Acteon, 2 Dod. 48; The Louisa Charlotte, 1 Dod. 308. So a license may run to "any person," and then may be used by an enemy: The Louisa Charlotte, 1 Dod. 308; Mammett v. Bouliam, 15 East, 477. A license to trade must

§ 2572. Misdescription of Land on which Building Located does not Avoid Policy.—The fact that a policy of insurance on a dwelling-house misdescribes the land on which

be granted by competent authority: Vanharthals v. Halhed, 1 East, 487; Shiffner v. Gordon, 12 East, 296; The Hope, 1 Dod. 226. The trade is limited by the terms of the license and must be conducted in accordance with the permission granted: Le Cheminant v. Pearson, 4 Taunt. 367; Anthony v. Moline, 5 Taunt. 711; The Cosmopolite, 4 C. Rob. 8; The Juffrow Catherine, 5 C. Rob. 141; Gordon v. Vaughan, 12 East, 302, n.; The Jonge Frederick, Edw. Adm. 357; Hagedorn v. Reid, 1 Maule & S. 567. The grantee should be properly described, and it is held that a misdescription of the character of the person procuring the license will invalidate both it and the insurance: Klingender v. Bond, 14 East, 484; contra, Lencke v. Vaughan, 7 Dowl. & R. 266; 1 Bing. 473. And generally the character of the ship should correspond with that specified in the license, although when it does not and the change is not prejudicial, and it is evident that the intention of the government is not contravened or other reasonable cause exists, the change is immaterial: The Jonge Arend, 5 Rob. 14; The Dankbaarheib, 1 Dod. 183; The Hoffnung, 2 Rob. 162; The Vrow Cornelia, 1 Edw. 340. So also should the goods correspond with the license as a general rule, although the goods will be protected which are within the terms of the license: The Cosmopolite, 14 Rob. 11; Piescheli v. Allnutt, 4 Taunt. 492; Keir v. Andrade, 6 Taunt, 499; The Juffrow Catherina, 5 Rob. 141. A license does not operate retrospectively so as to legalize a voyage already commenced: Henry v. Stamforth, 4 Camp. 270; The St. Ivan, Edw. Adm. 376; nor will the insurance in such be valid, although it was not effected until after the grant: Henty v. Stamford, 1 Stark. 254. But if an act is done which requires a license, the presumption will be that it was procured rather than the contrary: Sewell v. Royal Exch. Assur. Co., 4 Taunt. 856; although one who claims the protection of a license must show a compliance with its terms: Vandyke v. Whitmore, 1 East, 475; Vanhartels v. Halhed, 1 Eeast, 486, n. If the time be limited, the privilege must be exercised within the time specified: Williams v. Marshall, 6 Taunt. 390; 7 Taunt. 468; Tallock v. Boyd, 7 Taunt. 472. For other authorities see numerous cases reported: 2 Taunt. 249, 416; 3 Taunt. 131, 534, 546, 554; 4 Taunt. 4, 136, 178, 367, 478, 483, n., 605, 717; 5 Taunt. 726; 1 Maule & S. 39, 220, 450; 2 Maule & S. 100, 485; 3 Maule & S. 337; 5 Maule & S. 25, 122; 3 Camp. 83, n., 84, n., 85, 158; 4 Camp. 339; 1 Stark. 222, 254; Busk v. Bell, 16 East, 3; Feise v. Newham, 16 East, 197; Osevell v. Vigne, 15 East, 70; Ingham v. Agnew, 15 East, 517; Daffilis v. Parry, 3 Bos. & P. 3; 1 Arnould on Marine Insurance, Perkins' ed. 1850, *719, et seq., *731, et seq.; 1 Parsons on Marine Insurance, ed. 1868, 21, 22, 353; 1 Phillips on Insurance, 147, secs. 243-53; 3 Phillips on Evidence, *246.

the dwelling is situated does not affect the risk nor render the policy void.[148]

§ 2573. **When Failure to Name Destination does not Avoid Marine Risk.**—The contract is not so indefinite and uncertain as to render it void, although the point of destination is not named under a marine risk, where the contract under a "uniform canal cargo policy" is evidenced by an entry in a book accompanying the policy under the words "from" and "to," the words "from New York harbor" indicating the shipments where there is evidence that the term "harbor of New York," according to usage included certain points in the vicinity within the customhouse district of New York.[149]

§ 2574. **Policy to Himself by Agent of Insurer and Receiver Void.**—An insurance agent cannot issue a policy to himself as receiver without the insurer's consent, such policy so issued being null and void.[150]

[148] Kansas Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486; 39 Am. St. Rep. 356.

[149] Petrie v. Phœnix Ins. Co., 132 N. Y. 137; 43 N. Y. St. Rep. 178.

[150] Wildberger v. Hartford F. Ins. Co., 72 Miss. 338; 28 L. R. Annot. 220; 17 S. Rep. 282, per Whitfield, J.

CHAPTER LV.

EXCEPTED RISKS AND LOSSES.

§ 2581. What constitutes invasion: Insurrection: Riot: Civil commotion: Usurped power.
§ 2582. Excepted risks: Fire caused by invasion, isurrection, riot or mobs, civil commotion, or by military or usurped power.
§ 2583. Falling of building except as result of fire.
§ 2584. Explosion: Insurers not liable.
§ 2585. Insurers not exempt where building blown up to prevent spread of conflagration.
§ 2586. Explosion occurring upon other premises—Loss to insured property the result of explosion only.
§ 2587. Explosion occurring on other premises from which fire ensues communicating to insured premises.
§ 2588. "Loss by explosion of any kind": Insurer's liability: Under such clause where fire ensues: New York rule.
§ 2589. Same subject: Rule in Ohio.
§ 2590. Same subject: Rule in Illinois.
§ 2591. Same subject: Rule in Pennsylvania.
§ 2592. Same subject: Conclusion.
§ 2593. No liability for explosion "unless fire ensues."
§ 2594. Construction of other provisions as to explosion.
§ 2595. Conclusion as to excepted liability in case of explosion.
§ 2596. Loss by theft excepted.
§ 2597. Exception of liability for "fire caused by hurricane."
§ 2598. Exception of liability for fire resulting from use of steam engine.
§ 2599. Insolvency of debtors: Credit insurance: Exception of liability: Discontinuance of business: Death of partner.

§ 2581. What Constitutes Invasion, Insurrection, Riot, Civil Commotion, or Usurped Power.—The term "invasion" generally has reference to the warlike or hostile entrance of an armed force into the territory of another, and the question should be, Was the invasion the proximate cause of the loss? a point not entirely free from difficulty in all cases; as where the property is destroyed to prevent its being taken by the invading force. But it may reasonably be assumed that an invading army is liable to com-

mit acts of spoliation or burning, and, this being true, it is unimportant how the burning originated, whether by acts of carelessness or intentionally. It is sufficient that the invasion was the means or efficient cause of the loss, and the same would be true as to military or usurped power.[1] An "insurrection" has been defined as "seditious rising against the government; a rebellion; a revolt."[2] Acts of the confederate forces occasioning the loss, done on June 28th, were declared those of a public enemy regularly organized; acts of sovereignty executed by the regularly constituted authorities, and not the acts of a mob or rioters.[3] A "riot" is an unlawful act done or attempted to be done by three or more persons, either with or without a common cause; it may also consist of a lawful act done in a violent or tumultuous manner. It is not material whether or not there is a previous unlawful assembling, or that the rioters originally assembled for a lawful purpose. It may be a question whether an assemblage or multitude be a riot. Force or violence, or some acts tending thereto calculated to cause terror to one or more, are necessary in criminal law, although there may be a riot without actual violence. In insurance cases it is not necessary to first establish the fact of a riot by judgment of a criminal court.[4] Mr.

[1] See Ætna F. I. Co. v. Boone, 95 U. S. 117; reversing Boone v. Ætna F. I. Co., 40 Conn. 575; Pontz v. La. St. Ins. Co., 16 Mart. (La.) 80; Drinkwater v. London Assur. Co., 2 Willes, 363; Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613; Barton v. Home Ins. Co., 42 Mo. 156; Harris v. York Mut. Ins. Co., 50 Pa. St. 341.

[2] Spruil v. North Carolina Mut. L. Ins. Co., 1 Jones (N. C.), 126, per Nash, C. J

[3] Harris v. York Mut. Ins. Co., 50 Pa. St. 341. But see as to acts done April 1, 1861, Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613. See further as to who are "enemies," c. xi, herein.

[4] Spruil v. North Carolina Mut. Ins. Co., 1 Jones (N. C.), 1,126; Dupin v. Mutual Ins. Co., 5 La. Ann. 482, per the court; Lycoming F. Ins. Co., v. Schwenk, 95 Pa. St. 89; 40 Am. Rep. 629, per the court; Germania F. Ins. Co. v. Deckare, 3 Ind. App. 261; 21 N. E. Rep. 868. See State v. Dean, 71 Wis. 678; 38 N. W. Rep. 341. "A riot is the doing of some unlawful act of violence, or of some lawful act in a violent and tumultous manner, by three or more persons acting together without authority of law": Desty's American Criminal Law, ed. 1887, pp. 247-50; secs. 98-98c. On the point of prior lawful assemblage it is held otherwise than as stated in the text (and supported by the

Marshall[5] reports a case[6] before Lord Mansfield where an insurance company, which had paid a loss occasioned by the riots of 1780, was permitted to sue the hundred in the name of the insured and to recover under the riot act[7] full satisfaction. In this connection the law as stated by Mr. Cooley[8] is, that a municipal corporation is not "responsible for the destruction of property by a mob unless expressly made so by statute, as in some states it has been." The words "civil commotion," says Lord Mansfield, were introduced by the Sun Fire Office in 1727, "words as general and untechnical as can possibly be used"; and he further declares that "civil commotion" cannot be applied to any of the other words then used, viz., invasion, foreign enemy, military usurped power, but that they mean something else. "I think a civil commotion is this, an insurrection of the people for general purposes, though it may not amount to a rebellion, while there is a usurped power," and he applies them to a case arising under the riot acts of 1780.[10] The words "usurped power" may

Louisiana case cited), in North Carolina, in the case of State v. Stalcott, 1 Ired. (N. C.) 30.

[5] 2 Marshall on Insurance, ed. 1810, 794.

[6] Mason v. Sainsbury.

[7] 1 Geo. I, c. 5, sec. 6.

[8] Cooley on Torts, 2d ed., pp. 740, *621.

[9] Citing Western Coll. etc. v. Cleveland, 12 Ohio, N. S., 375, and other cases.

[10] Langdale v. Mason, reported in 2 Marshall on Insurance, ed. 1810, 1791, per Lord Mansfield. He says concerning the facts: "The present was an insurrection of the people, resisting all law, setting the authority of the government at naught, and depriving of its protection whoever was obnoxious to them. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time and the very same night. . . . . What is their object? General confusion. It certainly was meant to aim at the very vitals of the constitution. . . . . Newgate is burnt down. The Fleet Prison, the King's Bench Prison, the New Bridewell, are burnt down, and all the prisoners set at liberty. The bank attacked, the excise and pay offices in Broad street threatened, ... military resistance necessary. . . . . Many men have been killed. What is this but a civil commotion, if any precise meaning can be affixed to these words? It is said that this is a civil commotion distinct from usurped power and rebellion. It is admitted that this kind of insurrection may amount to high treason, and to be sure it may. But the office

mean an invasion from abroad, or an internal rebellion conducted by authority, and not the power of a common mob.[11] The clause "notorious resistance to lawful authority" has been construed as meaning such an unusual and extraordinary state of affairs as that the usually constituted civil authorities are overpowered, and consequently unable and inadequate for the time being to successfully contend therewith.[12]

§ 2582. Excepted Risks—Fire Caused by Invasion, Insurrection, Riot, or Mobs, Civil Commotion, or by Military or Usurped Power.—If a policy contains a clause excepting loss by fire caused by invasion, insurrection, riot, or mobs, civil commotion, or by military or usurped power, there can be no recovery for damage by fire, though the superior officer of the invading army or of the rebellion has given no command that the building shall be destroyed or burned.[13] If it appears in such a case that the loss was in consequence and by reason of the military and usurped power, and that that was the proximate cause of the loss, then the insurers are not liable.[14] In a case which arose in Connecticut[15] involving the

(insurer's) do not mean to try whether these rioters are guilty of high treason or not. It is not put upon that, but upon the grounds of civil commotion. It is not an occasional riot; that would be another question. I do not give an opinion what that might be." See, also, Spruil v. North Carolina Mut. L. Ins. Co., 1 Jones (N. C.), 126, where it is said a civil commotion "requires the wild or irregular action of many persons assembled together," per the court.

[11] Drinkwater v. London Assur. Co., 2 Willes, 363, per Gould, J.; City Fire Ins. Co., v. Corlies, 21 Wend. (N. Y.) 367, per Bronson, J.; Ætna Ins. Co. v. Boone, 95 U. S. 117; reversing 40 Conn. 575; Barton v. Home Ins. Co., 42 Mo. 156; 97 Am. Dec. 329. See Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613. "The words 'military' or 'usurped power' are ambiguous; . . . . they must mean rebellion conducted by authority; as in the year 1745 when the rebels came to Derby; and if they had ordered any part of the town or a single house to be set on fire, that would have been by authority of rebellion. . . . . It must be rebellion got to such a head as to be under some authority; . . . . determined rebellion with generals who could give orders. . . . . Usurped power takes in rebellion acting under usurped authority": Langdale v. Mason, per Lord Mansfield, reported in 2 Marshall on Insurance, ed. 1810, 1791.

[12] Strauss v. Imperial F. Ins. Co., 94 Mo. 182; 4 Am. Rep. 368.

[13] Barton v. Home Ins. Co., 42 Mo. 156; 97 Am. Dec. 329.

[14] Barton v. Home Ins. Co., 42 Mo. 156; 97 Am. Dec. 329.

[15] Bacon and Boone v. Ætna F. Ins. Co., 40 Conn. 575.

construction of such a clause the following facts appeared: The property burned was at a place occupied by military forces of the United States. Military stores had been deposited in one of the public buildings. It being found that a successful defense of the city could not be made, the officer in command of the forces ordered the destruction of the stores, to prevent the enemy from obtaining possession of the same, and therefore the building in which they were placed was set on fire; the fire was communicated from other buildings to that containing the insured property, and it was held that this was not within the meaning of the provision, as the setting on fire of the building containing the stores was the proximate cause of the loss, though the attack of the enemy furnished the motive for such act. It was further declared that the clause did not refer to lawful acts of military authorities of the government, but was only intended to include the unlawful acts of persons in hostility to the lawful authorities, and that the acts of the commander in ordering the firing of the buildings was a lawful act, and not within the exception in the policy.[16] In the United States supreme court, however, it is held that a loss in such a case is within the meaning of the condition, and that the insurers are not liable.[16a] If a house is destroyed by a riotous assemblage, and a clause in the policy excepts a loss of such a character, the insured is not liable; nor is it material that the riotous assemblage was originally for a lawful purpose.[17] A condition in a fire policy excepting "loss by fire occasioned by mobs or riots" does not extend to a loss caused by the burning of an adjoining bridge by order of the military authorities to prevent the advance of an armed force of rebels.[18] Where an insured coal-breaker was burned at night by a party of several men who fired shots and drove away the watchman, it was held a riot, without proof of a previous unlawful assembling accompanied by force or violence.[18a] But

[16] See, also, Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613.

[16a] Ætna Ins. Co. v. Boone, 95 U. S. 117.

[17] Dupin v. Mutual Ins. Co., 5 La. Ann. 482.

[18] Harris v. York etc. Ins. Co., 50 Pa. St. 341.

[18a] Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. St. 89; 40 Am. Rep. 629.

where five masked men broke forcibly into a dwelling-house and by threats of personal violence compelled the owner to vacate, and then burned down the building, this was held a loss by means of a riot, under a statute defining a riot as an act done by three or more persons in a tumultuous manner.[19] But the blowing up of buildings by gunpowder for the purpose of arresting a conflagration is not a loss by usurped power.[20] The construction of a clause in an insurance policy providing that notorious resistance to lawful authority should not render the company liable for loss or damage by fire arising therefrom is governed by preceding clauses, which relieve the company from payment of the loss when the fire should happen by any invasion, foreign enemy, insurrection, or civil commotion, lawful military power, usurped power, or by any person or persons engaged in a riot; and under a policy containing such clauses the company cannot escape liability from loss by a fire brought about by the efforts of four or five convicts who had combined to effect an escape from prison, where the prison power was adequate to overthrow such resistance, and where as soon as such convicts came in contact with an officer authorized to arrest they immediately yielded; nor is the company aided by the fact that exaggerated reports were circulated outside the prison walls where a large number of persons had lawfully assembled and armed themselves to render assistance.[21]

§ 2583. Falling of Building Except as Result of Fire. Under a provision that "if a building or any part thereof fall except as the result of fire all insurance by this policy on such building or its contents shall immediately cease," the company exempts itself from any and all loss occurring subsequent to the falling of the building, though a fire may ensue immediately after the building has fallen. Thus, in a

[19] Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361; 21 N. E. Rep. 868, under Rev. Stats. Ind. 1881, sec. 1981.

[20] City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; 34 Am. Dec. 258. See, also, Field v. Des Moines, 39 Iowa, 575; 18 Am. Rep. 46.

[21] Strauss v. Imperial F. Ins. Co., 94 Mo. 182; 4 Am. St. Rep. 368.

Massachusetts case the policy contained such a condition. The insured building was equally and completely divided by a brick wall partition with communicating doors in each story. A girder fell in one-half, bringing down substantially the whole of that part and the goods stored therein, but leaving the other part standing uninjured. A fire afterward broke out in the fallen part destroying everything in it save the outer walls, the partition wall, and an elevator, but not communicating to the other part, and it was held that no action on the policy could be maintained.[22] An exception of this nature in a policy is, like all other provisions, to be strictly construed. So long as the building remains standing the policy does not cease, and the insurers are not exempt, no matter how much it may be damaged by the action of the elements or any other course.[23] If a part of a building falls, but goods remain undisturbed in another part which does not fall, it is held that the insured may recover for the goods so remaining which are destroyed by a subsequent fire, and also that the insurer is liable for damage caused by water used to extinguish the fire as to such goods as are not displaced or injured by the fall.[24] If the distinctive character of the building is not destroyed, and there is a fall of only a very small part of the structure, and no fractional part falls before the fire, this is not within an exception as to liability if the building or any part thereof fall except as the result of fire, the risk shall cease immediately.[25] Again, under a like condition as the above, it is held that the falling of the building as the result of an explosion within the walls is not within the exception, and the insurers are, in such case, liable for a loss by fire immediately ensuing.[26] Where the building adjoining the insured building had caught fire and only the walls were left standing, and, in consequence of their weakened condition, they fell the day after

[22] Huck v. Globe Ins. Co., Walker v. Queen Ins. Co., Stowe v. Girard F. & M. Ins. Co., 127 Mass. 306; 34 Am. Rep. 373.

[23] Fireman's Fund Ins. Co. v. Shotow, 80 Ill. 558; 8 Chic. L. News, 178. See, also, Lemon v. Liverpool Ins. Co., 51 Cal. 101.

[24] Lewis v. Springfield F. & M. Ins. Co., 10 Gray (Mass.), 159.

[25] London etc. Ins. Co. v. Crunk, 91 Tenn. 376; 23 S. W. Rep. 140.

[26] Dows v. Faneuil Hall Ins. Co., 127 Mass. 346.

the fire, crushing in the insured building, it was held that the fire was the proximate cause of the loss to the insured building, and that the insurers were liable.[27] And in another case, where the policy stipulated that the risk should immediately cease if the building should fall "except as a result of fire," and it appeared that the insured property was adjacent to another building used as a feedmill, the wall between them being a partition wall, and the feedmill caught fire before it fell, and the fall was caused by the partial consumption of the feedmill and the weakening of the partition wall by fire, which wall, together with a part of the elevator insured, also fell, then the falling of the insured building is a direct loss or damage by fire. The clause "falling except as the result of fire" was held in this case to have reference only to cases where the building might fall from some other cause than fire; as, for example, defective construction, the withdrawal of necessary support, storm, flood, or other like cause, and fire thereafter ensued. But that it was not intended to exclude cases where fire was the immediate or proximate cause of the fall, and the court, per Mitchell, J., further declares that "to render the fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. . . . . The question is, Was fire the efficient and proximate cause of the loss or damage?" [28] But under a policy of insurance stipulating that if the insured building fall except as the result of fire the insurance shall immediately cease, the insurer is not liable for the loss of the building felled by a cyclone and destroyed by fire resulting from the fall.[29]

§ 2584. Explosion—Insurers not Liable.[29a]—In the absence of any provision in the policy the insurers are not liable for loss by explosion of steam or other agent acting by

[27] Johnston v. West of Scotland Ins. Co., 7 C. O. of Gen. Sess. Cas. (Scotch.) 52.

[28] Ermentraut v. Girard F. & M. Ins. Co. (Minn. 1895), 65 N. W. Rep. 635.

[29] Nichols v. Sun Mut. Ins. Co., 71 Miss. 326; 42 Am. St. Rep. 465.

[29a] See secs. 2586-2595, herein.

expansion without combustion.[30] So where sugar in a sugar-house covered by an ordinary fire policy was destroyed by an explosion of the boilers used in manufacturing, the damage being caused by the explosion and not by fire, the insurer was held not liable.[31]

§ 2585. Insurers not Exempt where Building Blown up to Prevent Spread of Conflagration.—The necessity not infrequently arises for blowing up a building with some explosive to prevent the spreading of a conflagration. Where such a necessity arises, and an insured building is so destroyed, the insurers are liable. If the policy stipulates that "the insurer shall not be liable for an explosion by gunpowder," it is nevertheless a loss within the policy if the building is blown up in order to prevent the spreading of a large fire.[32]

[30] Scripture v. Lowell etc. Ins. Co., 10 Cush. (Mass.) 356; 57 Am. Rep. 111.

[31] Millaudon v. New Orleans Ins. Co., 4 La. Ann. 15; Marcy v. Sun Ins. Co., 14 La. Ann. 264.

[32] Greenwald v. Insurance Co., 3 Phila. (Pa.) 323. In this case it appeared that the insured building had, however, caught fire, and Sherwood, J., in his opinion says: "Had this means been resorted to before the fire had actually begun its work of destruction upon the property insured, it might be a question whether the underwriters would be liable." His subsequent words, however, would be equally pertinent had the fire not reached the insured property. They are as follows: "It is certainly very much against the true interests of insurers to raise any objections founded on the honest efforts of the insured of others to prevent the spread of fires, much more to print clauses meant to make the right of recovery depend upon what is or is not done by strangers or others present at the fire. Life indeed, as well as property, is often in peril, but where it is not men might be disposed, under such circumstances, out of regard for the insured, to stand still and let the property perish rather than imperil his rights by interfering with his claim for indemnity against the insurers. It would be a novel clause to introduce into a policy that in case of fire the insurance should be void if any water were applied to extinguish it. Quite as novel would it be were it provided that if there were no water nothing should be done. Yet the defendants in this case have told us that the clause that the insurers should not be liable for an explosion by gunpowder was meant to guard against the very thing which had been done. Had the citizens of Americus, instead of resorting to gunpowder, succeeded in any other way in separating the building in question from those contiguous to it, we would

§ 2586. Explosion Occurring upon Other Premises—Loss to Insured Property Result of Explosion Only.—Where the fire did not happen at the premises insured, but broke out in a building about two hundred feet distant, causing an explosion by gunpowder, which by the concussion of the air injured a building insured against fire, it was held that such a loss could not have been within the reasonable intent of the parties, and was not covered by the policy.[33] So in an English case, where it appeared that the insured premises were damaged by an explosion of a powder magazine, occurring about a mile distant, it was held not to be a loss within the policy.[34]

§ 2587. Explosion Occurring upon Other Premises from which Fire Ensues Communicating to Insured Premises. If the company excepts a loss by explosion, it is not liable for any loss or damage which the insured premises may sustain which is the mere result of concussion of an explosion upon other premises than those insured. If, however, explosion occurs upon other premises than those where the insured property is located, from which fire ensues, and communicates to the insured property, is the company liable? Under a decision in the United States supreme court[35] it was held that the company was not liable in such case. The facts were these: The policy provided that "insurers shall not be liable

probably have been told that it was destruction by a mob, against which there is a provision in most policies if not in this. We construe this clause differently and more for the interests of the underwriters when we say that fire originating from an explosion of gunpowder was what was meant to be guarded against, and not an honest effort, even if it was injudicious, on the part of those present to stop the flames." This language is quoted in a later case in New York (City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367), where an insured building which the flames had not reached was blown up by order of the mayor of the city, in order to prevent the fire from spreading, and it was there held that the insurers were liable for the loss to the insured property.

[33] Caballero v. Home Mut. Ins. Co., 15 La. Ann. 217.

[34] Everett v. London Assur. Co., 19 Com. B., N. S., 126; s. c. 11 Jur., N. S., 546; 34 L. J. C. P. 299; 13 Week. Rep. 862.

[35] Insurance Co. v. Tweed, 7 Wall. (U. S.) 44.

for loss or damage that may happen by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane." Cotton stored in a warehouse was insured; the street upon which the warehouse was located was about fifty feet in width, and upon the other side of the street was another warehouse, wherein an explosion occurred, which threw down the walls and scattered many combustible materials in the street. Fire followed as the result of the explosion and fall of the building, and was communicated to the warehouse containing the insured cotton from another building, which had been fired as a result of the explosion. It was held that insurers were not liable if the fire took place by means of the explosion, and that it did so take place unless some new power or force had intervened between the burning of the cotton and the explosion, and also that the fact that the fire destroyed another building before it was carried to the cotton did not operate as a new cause, and was no new force or power.[36] Can such a

[36] We think the words of the Illinois court are noteworthy in this connection: Commercial Ins. Co. v. Robinson, 64 Ill. 265. This point was not, it is true, directly before the court, the question in this case being whether a fire directly after an explosion was excepted. The court, however, in its argument, supposes such a case, and says: "When a person takes out a policy and pays the premium, he takes it for granted without reading the policy that he cannot make the risk more hazardous by storing highly inflammable materials upon the premises. He knows that it would be acting in bad faith with the company, and that the policy has probably provided against it, but he would have no reason to suppose that among the voluminous stipulations of the policy there would be found one intended to deprive him of its benefit because a fire which has destroyed his property originated in another house a half-mile distant in the explosion of a camphene lamp. Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy contended for by the company would make the insured assume the liability for the carelessness of others. The great fire at Chicago is supposed to have originated in the overturning and explosion of a lamp, but we are not aware that any of the insurance companies that suffered by that fire have sought to interpose this defense, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property there destroyed. Counsel for the company, feeling the unreasonable char-

doctrine as that stated in the United States supreme court be sound? It does not seem consistent with the intention of the parties. The insured is entitled to the benefit of all doubts in case of restrictions in the policy. The question seems pertinent whether such a case is not within the rule requiring a strict construction against the insurer, and whether the construction given is not opposed to the doctrine contra proferentem. To hold that the insurer is exempt from liability in cases of this character would operate in a great measure to defeat the very object of insurance.

§ 2588. "Loss by Explosion of any Kind"—Insurer's Liability under such Clause where Fire Ensues—New York Rule.—The question has not infrequently arisen as to the construction of the clause "loss by explosion of any kind" immediately following the provision exempting insurers from liability "for any loss or damage by fire caused by means of an invasion," etc. In many cases it is contended by the insurers, and the claim has been sustained by the courts, that the words "by fire" were to be understood as if used after the word "loss," so as to read "loss by fire or by explosion of any kind." We will note briefly the decision upon this point. The case of Hayward v. Liverpool etc. Insurance Company[37] has been often referred to as sustaining this claim, but the words of the condition in that policy expressly excluded liability for subsequent fire, and the case cannot be properly cited as sustaining such a view. The policy there provided that the insurer should not be liable for any loss or damage "by fire

acter of their interpretation of this condition in cases where the fire comes from an explosion on other premises, speak of it as if it only referred to explosions on the premises of the insured. But the policy will have no such construction or limitation. We must either hold that the clause refers to loss by explosion simply, without reference to fire or to losses by fire occasioned by explosions anywhere, whether on or remote from its premises. There is no middle term. One is consistent with the context, reasonable in itself and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and in a large degree would make fire insurance a mere mockery."

[37] 3 Keyes (N. Y.), 456; s. c. 2 Abb. Dec. (N. Y.) 349; s. c. 7 Bosw. (N. Y.) 385; overruling s. c. 19 Abb. Pr. (N. Y.) 116.

which shall happen or arise from any foreign invasion . . . . or by any explosion." In another case, however, in New York[38] this precise question arose. The policy provided that the insurers would not be liable "for any loss or damage by fire, ... nor for any loss occasioned by the explosion of a steam-boiler, or explosions arising from any other cause, unless specially specified in the policy." A boiler upon the premises exploded, and the explosion was the immediate cause of a fire which damaged the insured property. The insurers claimed that the latter part of the clause as to loss by explosion was intended to include therein loss by fire the result of explosion. The court in this case held, in substance, that as the policy covered loss by fire only, the exception would be meaningless unless it referred to loss by fire, since the insurer was not liable for loss which was merely the result of an explosion, even in the absence of any provision in the policy; that the provision referred "prima facie to such a loss as by the prior provisions of the contract the defendants would be bound to indemnify against," and not to one which would not be embraced in the general terms of the policy, and as to which there was no occasion to introduce an exception.

§ 2589. **Same Subject—Rule in Ohio.**—In Ohio,[39] the same question has arisen concerning a policy containing a provision of this nature, but worded differently, although the same question arose as to the construction. The provision was as follows: "This company is not liable for loss or damage by lightning or tornado unless specially mentioned and insured against, but will be responsible for loss or damage to property consumed by fire occasioned by lightning. Nor will this company be responsible for any loss or damage to property consumed by fire happening by reason of or occasioned by any invasion, ... nor to any loss or damage occasioned by or resulting from any explosion whatever." The ground of the decision was much the same as that in the New York

[38] St. John v. American Mut. F. & M. Ins. Co., 11 N. Y. 516 (opinions were filed by six judges in this case).

[39] United L. F. & M. Ins. Co. v. Foote, 22 Ohio, 340; 10 Am. Rep. 735.

case above.[40] The court said: "The foundation point, however, in construing this condition is found in the general undertaking of the policy. It will be observed that the underwriter undertakes to insure against loss and damage by fire only, but nevertheless against loss and damage by fire generally, and the maxim 'causa proxima non remota spectatur' applies. Now, we think, without doubting, that the purpose of inserting this condition was to relax the rigor of this maxim, and exempt from the general risk of the policy certain losses which would otherwise fall within its scope and meaning." The court then considers the different clauses in the exception, and says: "Unless there is something in the subject matter of this clause that indicates that the words 'by fire' were omitted for the purpose of showing a design to adhere to and continue the general risk in case an explosion should result in a fire, we think that they or their equivalent should be supplied by implication or construction. Is such purpose indicated by any fair use of the terms employed? That a loss other than by combustion resulting from explosion, when the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only is a doctrine not only reasonable in itself, but is sustained by authority.[41] And it is quite clear that a loss by fire which is occasioned by an explosion is within the like risk. These terms are certainly comprehensive enough to include both descriptions of loss, whether by explosive force or loss superinduced by combustion. . . . . We can find no good reason for doubting that loss and damage by fire resulting from an explosion was intended to be exempted by this condition from the general risk of the policy, and are of opinion, therefore, that this clause, properly construed, should read, 'nor any loss or damage by fire occasioned by or resulting from any explosion whatever.'" There is a later case[42] in this state which, though the court in its decision attempts to distinguish

[40] St. John v. American Mut. Ins. Co., 11 N. Y. 516.

[41] Walters v. Merchants' Ins. Co., 11 Pet. (U. S.) 225; Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 357; Millaudon v. New Orleans Ins. Co., 4 La. Ann. 15.

[42] Boatmen's F. & M. Ins. Co. v. Parker, 23 Ohio St. 85.

from the case we have just cited, does not seem entirely in harmony with that decision. The policy in this case provided that the insurers should not be liable for damage to property by lightning aside from fire, nor for damages occasioned by the explosion of a steam-boiler, nor for damages by fire resulting from such explosion nor explosions caused by gunpowder, gas, or other explosive substances. A fire was caused by an emission of gas from oil which was being distilled. The fire extended to other parts of the works and there ignited gas and oil, which exploded, and was scattered over the premises, destroying the works. It was held that the insurers were exempt from loss caused directly by the explosive force of the gas, but were not exempt from losses occurring by fire which was a consequence of the explosion. It will be seen that the courts attempt to distinguish this case[43] from that of United States Life, Fire, and Marine Insurance Company v. Foote.[44] But it would seem that exactly the same reasoning by which the court reached its conclusion in the first consideration of the question would have controlled in the second, or vice versa. The cases are certainly so clearly controlled by the same principles that different conclusions should not be reached. The general undertaking is of a loss by fire only, and that the provisions are meaningless unless construed as extending to losses by fire would equally apply in the later case. The conditions are practically the same, and if this rule is applicable in the one case it is in the other. If the provision was meaningless in the former case it certainly is in the latter. The two cases cannot be reconciled, though there is an attempt made by the court to distinguish them, and the doctrines stated in the later case must, we think, be considered as being contrary to that laid down in the much-quoted case of the United States Insurance Company v. Foote.[45]

§ 2590. Same Subject—Rule in Illinois.—A rule has been laid down in Illinois which is directly contrary to that

[43] Boatmen's F. & M. Ins. Co. v. Parker, 23 Ohio St. 85.
[44] 22 Ohio St. 340; 10 Am. Rep. 735.
[45] 22 Ohio St. 340; 10 Am. Rep. 735.

stated in the New York cases,[46] and which is also contrary to that stated in the supreme court of the United States.[47] The policy in this case provided that the company should not be held liable "for any loss caused by the explosion of gunpowder, camphene, or any explosive substance or explosion of any kind." It was held that the company was not exempted by such clause from liability from losses by fire caused by explosion, but simply from liability for losses occasioned by the explosion itself.[48] In this case the insurers claimed the provision as to explosions would be inoperative unless it was held as referring to loss by fire consequent upon an explosion, since the company was not in any case liable for loss the result of explosion. The company claimed that the words "by fire" used in the first part of the clause above mentioned were implied in the clause excluding loss by explosion. The court, however, held that a reasonable construction of the clause would be to include therein only loss directly due to explosion, and not loss by fire which ensues as a result of an explosion; that the former construction was consistent with the words of the clause as a reasonable construction and just to both parties, while to give the latter construction would be to insert two words which were not in the clause, which were inconsistent with the terms of the policy, and which would be unjust to the insurer.[49]

§ **2591. Same Subject—Rule in Pennsylvania.**—In a case which arose in Pennsylvania[50] a conclusion similar to that reached in Illinois[51] was arrived at, and the Illinois case was also cited and approved.

§ **2592. Same Subject—Conclusion.**—It will be seen from the cases cited in the foregoing sections that there is much conflict and uncertainty as to the construction of such

[46] See sec. 2588, herein.

[47] Insurance Co. v. Tweed, 7 Wall. (U. S.) 44.

[48] Commercial Ins. Co. v. Robinson, 64 Ill. 265; 16 Am. Rep. 557.

[49] The opinion in this case contains a discussion of some decisions upon this point.

[50] Heffron v. Kittanning Ins. Co., 132 Pa. St. 460; 20 Atl. Rep. 698.

[51] Commercial Ins. Co. v. Robinson, 64 Ill. 265; 16 Am. Rep. 557.

a condition. New York has held [52] that it means loss or damage by fire, since the clause excepting loss by explosion is meaningless unless so construed. The cases in Ohio are not in harmony, and later cases certainly favor a contrary view.[53] In Illinois[54] and Pennsylvania,[55] also, the courts have decided directly contrary to the cases in New York. There are certainly strong arguments leading to the conclusions upon each side of the case. Little can be added by us to these arguments as presented in the opinions. It seems from a careful examination of all the decisions that the rule of the Illinois court[56] is the most reasonable. It certainly is more in line with ordinary rules governing the construction of contracts of insurance and exceptions therein; it is more consistent with justice, and more in accord with the apparent intention of the parties. These provisions are inserted by the assurer, and in case of doubt they should be construed strictly against him, nor should they be extended by implication so as to embrace cases which are not clearly within the exception. The insurer should not be permitted to insert clauses with equivocal meanings calculated to lead the insured to reasonably understand one thing and then rely upon the courts to give by implication an entirely different construction. The insured has a right to rely upon the contract as made, and can reasonably be justified in assuming that in omitting the words "by fire" the insurer was content to leave it to the courts to determine the proximate cause of the loss, and to grant such remedy as the contract calls for under a fair and reasonable construction, having in view the general rule which obtains in construing exceptions with reference to the words used to express the parties' intentions, for it is clearly within the power of those contracting to expressly provide in clear and unequivocal terms exactly what is intended.

§ 2593. No Liability for Explosion "Unless Fire Ensues."—Another provision as to explosion is that the in-

[52] See sec. 2588, herein.
[53] See sec. 2589, herein.
[54] See sec. 2590, herein.
[55] See sec. 2591, herein.
[56] See sec. 2590, herein.

surer shall not be liable for any loss or damage "caused by explosion unless fire ensues," and then for loss or damage by the fire only. In an action on a policy which contained such a provision,[57] it appeared that an explosion occurred as a result of certain vapor coming in contact with a lighted lamp. The explosion shattered the walls of the building, and a fire immediately ensued. It was held that an instruction to the jury that the insured was entitled to recover the entire amount of their loss, whether the loss was due to the fire or to the violence of the explosion, was erroneous, as the defendant was not liable for the loss which arose from the force or violence of the explosion. They were liable for the loss by fire, however.[58] Where a fire insurance on sulphuric acid exempted the insurer from liability for loss by explosion unless fire ensued, and the building in question was blown down by a storm, and the chamber containing the acid was broken and the acid lost, and the plaintiff claimed that the storm blew fire in contact with escaping gases and air and created an explosion, which caused the loss, it was held that in either case there was no liability under the policy.[59] The insurers are liable upon a policy which contains a condition of this nature where fire originates in the insured premises, and the fire subsequently produces an explosion which destroys the property; the entire loss in such a case is held to be a loss by fire.[60]

[57] Briggs v. Mutual Ben. etc. Ins. Co., 66 Barb. (N. Y.) 325. The provision in this case was, that the insurer shall not be liable "for a loss by lightning of any kind unless fire ensues, and then for a loss by damage by fire only."

[58] Briggs v. North British etc. Ins. Co., 66 Barb. (N. Y.) 325; Briggs v. North American Ins. Co., 53 N. Y. 447.

[59] Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70; 40 Am. Rep. 403. The condition in this policy read that insurer should not be liable "for any loss caused by the explosion of gunpowder or any explosive substance . . . . or explosion of any kind unless fire ensues, and then for the loss or damage for fire only."

[60] Washburn v. Farmer's Ins. Co., 2 Fed. Rep. 633. The condition in this case provided that the insurer should not be liable for loss "covered by the explosion of gunpowder or any explosive substance or explosion of any kind unless fire ensues, and then for the loss or damage by fire only." See, also, Washburn v. Miami Valley Ins. Co., 2 Flip. (C. C.) 664.

§ 2594. Construction of Other Provisions as to Explosion.—Another provision excepting the insurers from liability which has come before the courts for construction is, that in case the insured property "be damaged by the bursting of a boiler, or by explosion from any cause, this policy shall be void the instant the casualty by explosion occurs." In an action on a policy containing this provision it was held [61] that the clause was unambiguous, was binding upon the insured, and that the policy ceased to be of any force the instant the explosion occurred. Where a policy provided that the insurer would not be liable for any loss "occasioned by explosions of any kind, by means of invasion," etc., it was held that this did not mean that the policy limited the loss to explosions occasioned by invasion.[62]

§ 2595.—Conclusion as to Excepted Liability in Case of Explosion.—From a consideration of the cases in the preceding sections upon the question of insurers' liability where loss by explosion is excepted, it will be seen that the decisions are not at all in harmony. There is one class of decisions to the effect that if the insurers except loss by explosion, it means loss by fire the result of explosion, as otherwise the condition is meaningless. We find another class where it is held that the exception does not include loss by fire which ensues immediately after an explosion, but only includes all cases of loss by explosion alone. We then find a case in the United States supreme court which holds that the insurers are exempt even though the explosion occurs upon other premises and communicates by other buildings to the insured property, unless some new and distinct cause intervenes. These decisions certainly cannot be reconciled. We have seen that the insurers are exempt from loss the immediate result of the concussion, though the explosion occurs upon other premises, and there does not seem to be any case which disputes this. If this point is not disputed, then are not the words of the Illinois court pertinent in this connection? They are as fol-

[61] Waldeck v. Fire Ins. Co., 53 Wis. 129; 56 Wis. 96.
[62] Lumley v. Citizens' F. etc. Ins. Co., 14 W. Va. 33.

lows:[63] "We must either hold that this clause refers to loss by explosions simply without reference to fire, or to losses by fire occasioned by explosions anywhere, whether on or remote from the premises; there is no middle term, and it must receive one of these constructions or the other." And is this not true? Certainly, the case of Insurance Company v. Tweed,[64] already considered, is in line with this view. If we admit this latter doctrine, can it be reasonably said to be a construction in accord with the intentions of the parties? Do not the insurers intend exactly what they say when they exclude loss by explosion? Do they intend to exclude subsequent losses by fire occurring as an immediate and direct result of such explosion? These questions and others have arisen in the discussion of the subject, and for a fuller consideration of them we can only refer to the opinions in the cases which we have cited, where will be found several learned discussions of the principles involved. The decisions certainly cannot be reconciled as they at present stand, and the question is indeed an open one presenting a wide field for argument.

§ **2596. Loss by Theft Excepted.**—A condition in an insurance policy that the company will not be liable "for any loss or damage to goods contained in a show-window when the loss or damage is caused by the light in the window, nor shall the company be liable for loss by theft," applies to theft from the show-windows, and not to theft committed in the necessary removal of goods to save them from impending conflagration.[65] Where a policy provides that the insurers should "not be liable to make good any loss by theft, or any loss or damage by fire" occasioned by riots, etc., it was held that the exception of liability for theft was not confined to fires so occasioned, but extended to losses by theft at any fire.[66]

§ **2597. Exception of Liability for "Fire Caused by Hurricane."**—It is held under a policy of this character

[63] Commercial Ins. Co. v. Robinson, 64 Ill. 265; 16 Am. Rep. 557.

[64] 7 Wall (U. S.) 44.

[65] Lieber v. Liverpool etc. Ins. Co., 6 Bush. (Ky.), 639; 99 Am. Dec. 695.

[66] Webb v. Protection etc. Ins. Co., 14 Mo. 3.

that a loss resulting from the falling of a building during a high wind and a fire subsequently occurring is not covered by the policy.[67]

§ **2598.—Exception of Liability for Fire Resulting from Use of Steam-engine.**—In a recent Maryland case the provision was, "this company will not become responsible for any loss or damage by fire . . . . resulting from the use of any steam-engine temporarily employed for the purpose of threshing out crops of any kind." There was also a condition stipulating that, in case of an engine being stationed on the premises in close proximity to the buildings insured, the company should appoint a committee to examine forthwith and ascertain the amount of increased risk, and if increase of risk was found, an additional premium note should be given for the increase. Notice was given the general agent of the company of the use of an engine for grinding bark. No committee was, however, appointed, nor any note given, and it was held that if the use of the engine increased the risk, and no additional note was given, the right to recover would not be defeated, unless the loss occurred from that increase.[68]

§ **2599. Insolvency of Debtors—Credit Insurance—Exception of Liability—Discontinuance of Business—Death of Partner.**[69]—If a credit indemnity policy stipulates

[67] Pelican Ins. Co. v. Troy Co.'s O. A., 77 Tex. 225; 13 S. W. Rep. 980. In this case the action was brought on two policies, each of which contained these provisions: "1. This company shall not be liable for any loss or damage by fire caused by means of a hurricane; 2. If the building shall fall except as the result of a fire, an insurance by this company on it or its contents shall at once cease and determine." The fire occurred during a severe hurricane, and evidence tended to show that its origin was by the breaking of a lamp by falling timbers, the house being partially blown down. Stayton, C. J., said: "The petition should have averred that the fire did not occur from one of the excepted causes. This was necessary to show a cause of action, for the company did not insure against loss by fire caused by a hurricane, not were the policies binding at all for a loss by a fire occurring after the fall of the house, unless the fall was caused by fire, for the parties had contracted that in that event the contract of insurance should not longer be operative."

[68] Schaeffer v. Farmers' Mut. etc. Co., 80 Md. 563; 31 Atl. Rep. 317.

[69] See sec. 2052, herein.

for nonliability on the bond in the event of failure of or discontinuance of business by the indemnified, the death of a member of a creditor firm long after goods have been sold and delivered does not operate on the date of said death as such discontinuance of business within the exclusion; nor does it release the obligor company from its liability to make good a loss arising from the subsequent insolvency of the debtor during the continuance of the bond. The term "discontinuance by the indemnified" has relation to the act of the indemnified, either voluntary or an act consequential thereon.[70]

[70] American Indemnity Co. v. Crassard (Md. 1896), 34 Atl. Rep. 703. In this case the court, per McSherry, J., says: "The object of this peculiar kind of indemnity is to guarantee vendors against loss by reason of the insolvency of their debtors; and if the debt has been contracted during the continuance of the bond of indemnity and while the firm or the individual protected by the bond is actually engaged in business, though the loss happens after the death of one member of the creditor firm or after the death of the individual creditor when there is no firm, the contingency contracted against—the insolvency of the debtor—is precisely the same as though the death of the creditor had not occurred at all. If, in the case of an individual creditor who is indemnified by such a bond, and who, after selling his goods, dies, it be held that the bond is made void because of his death, there would be superadded, by construction, a provision of avoidance beyond the two designated in the eighth clause. The failure of the person indemnified, and his discontinuance of business are specified. His death is not. In addition, then, to the requirements that he should not fail and should not discontinue business, the obligation of the bond would be made subject to the further condition that the creditor survive the period of time covered by the contract of indemnity. And thus, by pure implication, there would be written into the eighth condition heretofore quoted a contingency not therein expressed or even necessarily implied. And in the case of a firm precisely the same condition would exist. Undoubtedly, the death of a member of a firm does, by operation of law, dissolve the partnership, but such a dissolution of the firm can in no sense be said to be a discontinuance of business by the indemnified. The surviving partners wind up the concern. The dissolution is by operation of law and not by the act of the parties, and the discontinuance of business on the part of the firm is not a discontinuance by the firm, but by operation of the law and in consequence of an act of God. Obviously, the term 'discontinuance by the indemnified' has relation to the act of the indemnified (either his voluntary act or the consequence of his voluntary act), precisely as the other condition (the failure of the creditor) relates to a situation arising from his own acts or conduct. Had the design been to constitute the

death of the creditor a ground for avoiding the bond, the addition of the words 'and the death of the indemnified' or words of like import would have placed the matter beyond dispute; and every individual purchasing such a bond would then have been advised in plain terms that the contingencies which he encountered and was obliged to avoid so as to enable him to recover on the bond were not only his own failure in or discontinuance of business but his death during the period covered by the indemnity. The construction contended for by the appellant places death (an act of God) in the same category as discontinuance of business by the indemnified (an act of the individual). It does not discriminate between what is the act of the party himself, on the one hand, and the consequence resulting from his death which, on the other hand, is not his own act, but makes the one the equivalent of the other in so far as respects the continuance of the validity of the bond. And it does this, too, by ascribing to the words of the bond a meaning which at best is both strained and unnatural. In resisting the enforcement of an obligation of this character upon the ground here relied on, the defendant must show that its refusal to fulfill its contract is justified by some term of defeasance contained in the undertaking itself; and unless this appears with reasonable clearness, the obligor cannot escape liability. If we entertain any reasonable doubt as to the correct interpretation to be placed on words we have been considering, that doubt would be sufficient to solve the question against the defendant, because its contract to indemnify must stand in full force unless more than a doubt exists as to whether the defeasible conditions embrace the particular ground of avoidance relied on."

CHAPTER LVI.

EXCEPTED RISKS AND LOSSES—LIFE, ACCIDENT, CASUALTY, AND TORNADO.

§ 2606. Death in known violation of law.
§ 2607. Death in known violation of law: Construction refers to voluntary criminal acts.
§ 2608. Same subject: Refers to both civil and criminal law.
§ 2609. Same subject: Conclusion.
§ 2610. Death or injury in violation of law.
§ 2611. Excepted liability where death occurs "by the hands of justice."
§ 2612. Death: Use of intoxicants.
§ 2613. Intemperance: "If insured becomes so far intemperate as to impair his health."
§ 2614. Death: Intemperance: Waiver of provision.
§ 2615. Death: Intemperance: By-laws of society.
§ 2616. Death caused by submission to illegal operation.
§ 2617. Accident policy: Injuries where no visible mark.
§ 2618. Excepted liability where death or injury "may be caused by intentional injuries inflicted by insured or any other person."
§ 2619. Dueling or fighting.
§ 2620. Excepted liability: Taking of poison: Contact with poisonous substances: Inhaling gas.
§ 2621. Poison or anything accidentally taken or inhaled.
§ 2622. Entering or leaving moving train.
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§ 2624. Voluntary exposure to obvious or unnecessary danger.
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§ 2626. Instances within the exception of voluntary exposure.
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§ 2628. Death by disease excepted: Fits.
§ 2629. Disease caused by accident and death superinduced by other causes not death by excepted disease.
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§ 2632. Occupations: Exception of liability for wrecking.
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§ 2635. Effect of words "sane or insane" in suicide clause.

§ 2636. "Sane or insane": That suicide committed deliberately or hastily, immaterial.
§ 2637. Suicide: "Felonious or otherwise, sane or insane."
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§ 2640. Doubt as to "suicide" or accidental or unintentional self-killing.
§ 2641. Suicide under clause benefiting third parties acquiring interest prior thereto.
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§ 2645. Suicide: By-law as part of contract.
§ 2646. Taking his own life by unlawful act: By-law.
§ 2647. Adoption of by-law against suicide after contract made.
§ 2648. Suicide: Policy to be void in case of death by violation of law.
§ 2649. Suicide: Intentional injuries by assured or another.
§ 2650. Suicide in absence of stipulation contra.
§ 2651. Suicide by insane person in absence of stipulation against suicide.
§ 2652. Suicide where policy obtained with that intent: Fraud: Creditor.
§ 2653. Suicide for benefit of assured's estate or third person.
§ 2654. Suicide: Temporary insanity.
§ 2655. Suicide: Temporary insanity: "Sane or insane, voluntary, or involuntary."
§ 2656. Suicide: Temporary insanity: "Felonious or otherwise, sane or insane."
§ 2657. Suicide: "Self-destruction": "In any form": "Disease": "Voluntary act of assured."
§ 2658. Stipulation as to "suicide": "Death by his own hand," and the like.
§ 2659. "Suicide" and like clauses: Rule in United States supreme court.
§ 2660. English rule.
§ 2661. Rule in this country.

§ 2606. Death "in Known Violation of Law."—In connection with the clause exempting the insurers from liability in case of death of assured "by his own hand," there is also generally found the clause exempting them from liability in case the insured shall die in the "known violation of any law," whatever may be the nature of the violation of the law, and whether the violation refers to merely the criminal or both

the criminal and civil law, the death, in order to avoid the policy, must be caused or occasioned while the act in violation of the law is being committed, and be not merely in consequence of the act and subsequent thereto. The act causing the death must be so close and immediate in its relation to all the other acts as to form a part of one continuous transaction.[1] So the policy is not avoided by the fact that the insured had had illicit intercourse with the wife of H. shortly before H. had killed him.[2] And where the insured had entered a public building, and by a show of force and by means of threats had obtained a sum of money, and was shot and killed while escaping, it was held that he having obtained the money, and being merely in the act of escaping, he was not at the instant of death violating any law, and a recovery could be had on the policy.[3] But where A's life was insured and A and B planned an assault on C, and B seized and held C, and C drew a pistol while A was running away, and the pistol was discharged and A was killed, it was held that whether the discharge of the pistol was intentional or not the policy was rendered void.[4]

[1] Insurance Co. v. Weaver, 19 Wall. (U. S.) 531; Clift v. Mutual etc. Ins. Co., 95 Mass. 308; 99 Mass. 318; Harper v. Phœnix Ins. Co., 19 Mo. 506; Bradley v. Mutual Ben. L. Ins. Co., 45 N. Y. 422.

[2] Goetzman v. Commonwealth etc. Ins. Co., 5 Thomp. & C. (N. Y.) 522; 3 Hun (N. Y.), 515.

[3] Griffin v. Western M. B. Assn., 20 Neb. 620; 57 Am. Rep. 848.

[4] Murray v. New York L. Ins. Co., 96 N. Y. 614; 30 Hun (N. Y.), 428; 48 Am. Rep. 658. The words of the court in Cluff v. Mutual B. L. Ins. Co., 13 Allen (Mass.), 308, are pertinent in connection with this question. "Assuming that Cluff did commit a criminal assault, it may not necessarily follow that he died in the known violation of the law. If he was shot while the assault continued, such would be the case. But if it had ceased, and Cluff was not threatening to renew it, and Cox had withdrawn out of his reach and then shot him, not in the course of the affray, but merely to revenge himself for what had been done or to prevent the seizure of the horses, then at the time he was killed Cluff was not engaged in a known violation of the law within the meaning of the policy. For he must have received the mortal wound during and while engaged in the commission of a crime, and not merely in consequence of it afterward. . . . . The question to be considered is: Were the two acts—the assault by Cluff and the firing of the pistol by Cox—a part of one conflict for the possession of the horses, or had Cox abandoned his attempt to re-

§ 2607. "Death in Known Violation of Law"—Construction—Refers to Voluntary Criminal Acts.—The cases are not in harmony as to the meaning of this provision. It is held in some courts that it refers only to voluntary criminal acts, while in others the provision is construed as referring to any act in violation of law which might naturally lead to a conflict which would endanger the life of the insured. In a Massachusetts case[5] it was held that the condition must be construed to refer to a voluntary criminal act on the part of assured, known by him at the time to be a crime against the law, and not to mere trespasses against property or other infringements of civil laws, with no criminal consequence attached. This case also held that offenses against persons and the property of another such as are recognized as crimes by the common law and the laws of civilized countries generally will be presumed to be crimes in each state of the Union, and the insured will be presumed to know the criminal laws of the government under the jurisdiction of which he was.[6] In Missouri[7] and in New York[8] decisions have been rendered which are substantially in accord with the Massachusetts doctrine.

tain the custody of the horses, and had Cluff desisted in his assault? Was the fight over, or had Cox merely retired to a more advantageous position? In short, if Cluff in the first instance did commit a criminal assault and the firing of the pistol was a part of the same continuous transaction, then the condition of the policy was violated."

[5] Cluff v. Mutual Ben. L. Ins. Co., 99 Mass. 327.

[6] In this case it appeared that the insured had started to unhitch and take a pair of horses, the property of his debtor, and that the son of the debtor had shot the insured. The point was raised that as the insured had done such act under an honest claim of right he was not guilty of the crime of larceny, and in reference to this the court said: "If the defendant should be able to satisfy the jury that Cluff had no color of title or right, nor of any authority except that, having a debt against the owner of the horses, he claimed a right to seize his property in payment by way of self-redress without regard to law, we think the defendants would then be entitled to the verdict. Such a claim would be a claim of the privilege to commit a crime, which the law will not recognize to be honestly made as a claim of right."

[7] Harper v. Phœnix Ins. Co., 19 Mo. 506.

[8] Bradley v. Mutual etc. Ins. Co., 3 Lans. (N. Y.) 34; 45 N. Y. 422. In the supreme court it has been held that this provision should

§ **2608. Same Subject—Refers to Both Civil and Criminal Law.**—In a case in Indiana[9] the court held that the clause referred to a known violation of a positive law, either criminal or civil, where the reasonable and natural consequences of such violation would be to increase the risk, but did not refer to any violation of either law which did not tend to have such a result. This is substantially the same view as that expressed by Justice Grover in the dissenting opinion in Bradley v. Mutual Benefit Life Insurance Company,[10] who said: "No one would contend that had the insured died in the state of New York from heart disease while engaged in selling lottery tickets the case would have come within the proviso. It might have been within the strict letter, but not at all within the intention of the parties, for the reason that the violation of law, although criminal, had no possible connection with the death, and in no possible way increased the risk. . . . . Again, suppose the death occurred from injury received while the assured was attempting to obtain by force the possession of a chattel of which another was in possession, the title to which was claimed by both, but which was really in the insured, the case would come within the proviso, for the reason that the risk was increased and the death caused by the violation of law by the assured, although such law was the civil law only, the deceased having committed no breach of the peace or any indictable offense. . . . . It follows that when the death occurs during the known violation of law by the assured, when such violation eminently tends to violence dangerous to life, the case comes within the proviso."

§ **2609. Same Subject—Conclusion.**—From an examination of the cases cited in the foregoing sections, it will be seen that the weight of authority favors the view that "death" in

not be limited in its application to criminal acts, but should be construed as having been intended to prohibit the insured from doing any act in violation of the law which would naturally lead to a conflict by which his life would be endangered. The court of appeals, however, reversed this decision.

[9] Bloom v. Franklin L. Ins. Co., 97 Ind. 478.

[10] 45 N. Y. 422; 6 Am. Rep. 115.

the known violation of the law "refers only to a voluntary criminal act, and not to mere acts of trespass." And such a view seems to be supported by the better reasoning. The words are inserted by the insurers for their own benefit and protection. They are used to exempt them from liability in case a certain event or events take place. It is an acknowledged rule of law that courts do not favor forfeiture, and in case of doubt a construction is to be given which is most favorable to the insured, and against the insurer who has introduced the clause. There is manifestly a doubt as to the meaning of this clause. If we, then, apply the general rule above stated as to forfeiture, the doctrine as stated originally in Missouri seems the correct one. If the insurer had intended to include such violation of both civil and criminal law as increased the risk, it would have been within his power to do so. But he has introduced a clause as to the meaning of which there is doubt, and consequently it should be strictly construed against him. If this clause stood alone, and not in connection with other clauses of exemption, it might then be construed as referring to those cases of violation of either civil or criminal law which increase the risk. In most cases, however, it is to be found in connection with other clauses excepting the insurers from liability. When so found should not the maxim "noscitura sociis" control? The other clauses are generally those excepting the insurer from liability in case the insured die by the hand of justice, or while engaged in dueling. One of these refers to crimes punishable by death, and the other to a violation of the criminal law. By applying this maxim we can reach the conclusion that those cases where death results in a violation of the criminal law only were intended. In all cases the intentions of the parties are to be ascertained, if possible. A construction is not to be given beyond the clear intent of those contracting. In none of the cases do the courts contend that a strict and literal construction should be given to this clause. If such were the case, there would be many forfeitures which neither party could reasonably have contemplated when effecting the contract. It being admitted that the words are not clear, and that there is a doubt, and it being a fact that the words are introduced by the

insurer for his own benefit, it would seem in accordance with the rules as to forfeiture that the construction most favorable to the insured should be given, and, therefore, the doctrine which we have stated at the beginning of this section is more clearly in accordance with the manifest intentions of both parties to the contract.

§ **2610. Death or Injury in Violation of Law.**—Where a statute[11] forbade traveling on Sunday except from necessity or charity, and forbade hunting, it was held that where the insured went hunting in violation of the law, and while returning was injured, the insurers were not liable upon an accident policy which provides that in case of "a violation of the law wholly or partly, directly or indirectly," producing an injury, they should not be liable.[12] Death which is the result of a personal rencontre while the insured is acting in the lawful defense of his person at the time, when he has reasonable ground for believing that his adversary intends him a great personal injury, is not within the clause.[13] Where a deserter was shot, as alleged, in self-defense by the sheriff, who was attempting to arrest him, it was held that it could not be held a matter of law that he was shot while engaged in an unlawful act, so as to avoid a policy providing against liability for death while engaged in or in consequence of any unlawful act.[14] In a suit upon a benefit certificate providing that no claim should be made for any injury which might happen "when engaged in or in consequence of any criminal act," an answer that at the time the plaintiff was injured he was in a public highway in a drunken condition, which is a criminal act, under the statutes of Indiana, and "that the injury happened to the plaintiff while he was engaged in and in consequence of a criminal act," is bad on demurrer, the conclusion being a mere conclusion of law, and no positive connection being shown between the alleged criminal act and the injury.[15] Though the

[11] Rev. Laws Vt., secs. 4315, 4316.

[12] Duran v. Standard L. & A. Ins. Co., 63 Vt. 437; 22 Atl. Rep. 530; 44 Alb. L. J. 317; 20 Ins. L. J. 1035.

[13] Overton v. St. Louis M. L. Ins. Co., 39 Mo. 122; 90 Am. Rep. 455.

[14] Utter v. Travelers' Ins. Co., 65 Mich. 545; 32 N. W. Rep. 812.

[15] National Ben. Assn. v. Bowman, 110 Ind. 355; 11 N. E. Rep. 316.

laws of a state may provide that no person shall walk on or along a railroad track except where the same may be laid across or along streets or highways, yet if the public have been permitted to cross a railroad company's track for such period of time as to create a license, it is not "violating the law," within the meaning of an accident policy which excepts liability for injuries received "while violating the law," for a person to cross the company's tracks at such place.[16] The carrying concealed weapons and being shot in a difficulty after leaving a bawdyhouse, neither fact being shown to have naturally been the cause of assured's death, does not bring the death within the exception of liability in consequence of a violation of law.[17] Under an accident policy stipulating against recovery through violation of law, it is held that the insured cannot recover for an accident received on Sunday while returning from a hunting expedition in a state where the statute prohibited hunting and traveling for pleasure on Sunday,[18] but it is held that although hunting on Sunday is prohibited by a statute, yet where the injury was sustained at a friend's after hunting, this is not an accident while violating the law.[19] Under a provision in an accident policy that the insurance will not cover death while the insured is engaged in any unlawful act, it is held that the insurers will not be absolved from liability unless it appears that the natural and reasonable consequence from such violation of the law is to increase the risk.[20] A preponderance of evidence is sufficient to show that one met death while violating the law contrary to the provisions of the policy. The fact need not be established beyond a reasonable doubt.[21]

[16] Lehman v. Great Eastern C. & I. Co. (Supr. Ct. N. Y. App. Div. 1896), 39 N. Y. Supp. 912.

[17] Jones v. United States Mut. Acc. Assn. (Iowa, 1895), 61 N. W. Rep. 485.

[18] Duran v. Standard L. & A. Ins. Co., 63 Vt. 437; 25 Am. St. Rep. 773; 22 Atl. Rep. 530.

[19] Prader v. National M. Assn. (Iowa, 1895), 63 N. W. Rep. 601.

[20] Conboy v. Railway Officials etc. Assn. (Ind. A. C. 1896), 43 N. E. Rep. 1017.

[21] New York Acc. Ins. Co. v. Clayton, 8 U. S. C. C. A. 213; 56 Fed. Rep. 559. The court, per Sanborn, C. J., says: "The court charged

§ 2611. Excepted Liability where Death Occurs "by the Hands of Justice."—Though the policy contains a condition that there can be no recovery thereon if the insured die "by the hands of justice," yet it has been held that such a provision is unnecessary.[22] Though this risk might be expressly covered, yet no recovery could be had thereon if the insured should die by such means, since it would be against public policy to permit a recovery in such cases; consequently, since an insurance against such a risk would not be upheld, it necessarily follows that a policy would be void in those cases even where it is expressly assumed by the insurer, and therefore the stipulation avoiding it is unnecessary. "Death by the hands of justice" has been defined by Tyndall, C. J., in Borradaile v. Hunter[23] as death in "consequence of a felony previously committed"; that is, death which is the result of a trial and sentence by a judicial proceeding. In the words of the court in a North Carolina case,[24] "to die by the hands of justice is to die by some judicial sentence for the commission of some felony."[25] The question might arise whether if

the jury that in order to avail itself of this defense the company must prove it beyond a reasonable doubt. This was clearly erroneous. Where a criminal act is alleged in a civil suit, proof beyond a reasonable doubt is not required to warrant a verdict and decision in support of the allegation. A preponderance of the evidence is sufficient. This is so well settled by the authorities in this country that it does not permit discussion": Citing United States v. Shapleigh, 4 U. S. C. C. A. 237; 54 Fed. Rep. 126, 134; 1 Greenleaf on Evidence, sec. 13a; Kane v. Insurance Co., 17 Am. L. Rep. N. S., 293, 297; Insurance Co. v. Wilson, 7 Wis. 169; Blaeser v. Insurance Co., 37 Wis. 31; Knowles v. Scribner, 57 Me. 495; Hoffman v. Insurance Co., 1 La. Ann. 216; Schmidt v. Insurance Co., 1 Gray (Mass.), 529; Young v. Edwards, 72 Pa. St. 257, 267; Insurance Co. v. Johnson, 11 Bush (Ky.), 587; Rothschild v. Insurance Co., 62 Mo. 356; Bradish v. Bliss, 35 Vt. 326; Ellis v. Buzzell, 60 Me. 209; Folsom v. Brawn, 5 Fost. (N. H.) 114; Matthews v. Huntley, 9 N. H. 146; Welch v. Jugenheimer, 56 Iowa, 11; 8 N. W. Rep. 673.

[22] Amicable Soc. v. Bolland, 4 Bligh N. R. 194; reversing Bolland v. Disney, 3 Russ. 351.

[23] 5 Man. & G. 639.

[24] Sprule v. North Carolina M. L. Ins. Co., 1 Jones (N. C.), 126.

[25] In this case the policy provided that "in case the said slave should die by means of any invasion . . . . or by the hands of justice the policy should be void." The slave escaped, and while re-

after the insured had been executed it could be, perhaps, shown by newly discovered evidence that the insured was innocent of the crime for which he was convicted. We do not believe that such a defense could be introduced. The insured has died by the hands of justice, having been duly convicted and sentenced. The manner of death which the policy excepted has occurred. It does not seem that the question of his innocence is in any way material. It may seem a hardship for the persons to whom the policy is made payable, who have been dependent on the insured for support and for whose protection the policy was procured, yet the insurer is entitled to the benefit of every provision of the policy when it is clear and definite. Certainly, this provision is clear.[26]

§ **2612. Death—Use of Intoxicants.**—Life policies stipulate against liability in case death occurs while assured is intoxicated, or occurs as a result of the intemperate use of intoxicants. The most frequent forms of the condition are that the policy shall be void "if the death shall be caused by the use of intoxicating drinks,"[27] or where death shall occur "while the insured was or in consequence of his having been under the influence of intoxicating drink,"[28] or if the insured shall "die by reason of intemperance from the use of intoxicating liquors."[29] Where the policy provides that the company shall not be liable for injuries which are received while the insured is intoxicated, or in consequence of his being "under the influence of intoxicating liquors," the phrase "under the influence of intoxicating liquors" is held to mean a condition amounting to intoxication. So an instruction to the jury that if the insured was under the influence of liquor, whether intoxicated or not, the company is not liable, was held to be erroneous.[30] Where a life policy was conditioned to be void

sisting arrest, was shot by the sheriff. It was held that death did not ensue within the meaning of any of those clauses.

[26] Cliff v. Schwart, 3 Man. G. & S. 436, 466, per Justice Patterson.

[27] Mutual L. Ins. Co. v. Libbe, 46 Md. 302.

[28] Shader v. Railway Pass. Ins. Co., 66 N. Y. 441; 23 Am. Rep. 65.

[29] Ranney v. Mutual Ben. L. Ins. Co., (1873), U. S. C. C., 1st Dist. of Mass.

[30] Standard L. & A. Ins. Co. (Ala. S. C. 1892), 10 S. Rep. 530.

in case death should occur "while the insured was or in consequence of his having been under the influence of intoxicating drink," and the insured while intoxicated was shot and killed, it was held that if the insured was under the influence of intoxicating drink when he died the policy was avoided, and that it was immaterial whether or not drunkenness was the cause proximate or remote of the death.[31] But where the policy provided that the insurers should not be liable where death "shall be caused by the use of intoxicating drink or opium," it was held that an instruction to the effect that death must be directly caused by such use and not remotely was correct.[32] In one of the above cases it will be observed that the policy excepted death while the insured was "under the influence of intoxicating drink," while in the case last noted it excepted death "caused by the use of intoxicating drink." In another case in Iowa the policy was to be void if the insured died "by reason of intemperance from the use of intoxicating liquors." The case came before the supreme court twice.[33] The evidence showed that the insured had during one of his periodical debauches, and while in a fit of delirium tremens, escaped from those who were taking care of him, and with no clothing on wandered through the streets and contracted a cold, resulting in congestion of the lungs and brain, from which he died. In the trial of the case the jury had been instructed as follows: "If you find that Miller's death was produced by other causes, then you should find for the plaintiff on this branch of the case. The policy must be construed strictly against the defendant, and if you find that Miller's death was only contributed to by the intemperate use of liquor, then you must find for the plaintiff upon this branch of the case. In order to avoid the policy the defendant must satisfy you by a preponderance of evidence that the sole or paramount cause of Miller's death was caused by the intemperate use of intoxicating liquors." The supreme court, when the case was put before it,[34] first held the instruction to be cor-

[31] Shader v. Railway Pass. etc. Co., 66 N. Y. 441; 23 Am. Rep. 65.
[32] Mutual L. Ins. Co. v. Stibbey, 46 Md. 302.
[33] Miller v. Mutual Ben. L. I. Co., 31 Iowa, 235; 34 Iowa, 222.
[34] 31 Iowa, 235.

rect, and said: "The defendant claims that 'if intemperance shortens life, it is a cause of death within the meaning of the policy.' It rarely, if ever, happens that the intemperate use of intoxicating drinks is indulged in for a considerable period without in some extent shortening life. The consequences of the construction contended for by the defendant would, therefore, be that an insurance company which had insured the life of one known to be intemperate, and which had charged a bigger rate of insurance in consequence of such fact, could exonerate itself from liability upon the policy by showing that the life of the assured had been shortened by intemperance. A sound principle does not lead to consequences so unjust and unreasonable. A proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, immediate, and predisposing cause. When several causes contribute to death as a result, it may be extremely difficult to determine which was the remote or which was the immediate cause, yet this difficulty does not change the fact that the death is to be attributed to the proximate and not the immediate cause." [35] In a subsequent consideration of this case, however,[36] the court held that the verdict and judgment must be set aside, as the evidence showed conclusively that the death was due to the excessive use of intoxicating liquors. In a case in the federal courts[37] the policy was also conditioned to be void in case the insured died "by reason of intemperance from the use of intoxicating liquors." The insurers claimed that death occurred while the insured had the delirium tremens, and consequently the policy was avoided. It appeared from the evidence that the physician had administered large quantities of morphine as a remedy, and the plaintiff claimed that though the insured had delirium tremens, the death was directly caused by the amount of morphine administered. The court in instructing the jury said: "If the disease from which the insured was suffering was delirium tremens, a mania a potu, or other disease resulting from intemperance from the

[35] See, also, Helterhoff v. Mutual B. L. Ins. Co. (Cin. Sup. Ct.), 4 Big. L. & A. Cas. 395.

[36] 34 Iowa, 22.

[37] Ranney v. Mutual B. L. Ins. Co. (1873), U. S. C. C., 1st Dist. Mass.

use of intoxicating liquors, and that disease, though not necessarily mortal, yet from want of helpful application or neglect of proper care or treatment produced exhaustion or fever, and consequent death, the death would probably be considered as resulting from the intemperance, even if the disease were not so mortal in itself, but that with good care and under favorable circumstances the insured might have recovered; yet if it became the cause of death by reason of the most efficacious mode of treatment not having been adopted, then the plaintiff would not be entitled to recover. If the death of the insured was caused by any drug administered to him in the course of medical practice for the purpose of cure, in sufficient quantity to produce death, and death was the result of the drug and not of the disease, then in such case the death could not properly be considered as resulting from the intemperance in the use of intoxicating liquors, and the plaintiff upon that branch of the case would be entitled to recover." It will be seen that the courts are not in harmony as to the meaning of the phrase "die by reason of intemperance from the use of intoxicating liquors." On the one hand, it is contended that this phrase only includes those cases where intemperance is the proximate or direct cause of death. On the other hand, it is contended that if the intemperance is the primary or substantial cause of the death, though some other cause may intervene from which death results, yet if the intemperance is the proximate and direct cause of the subsequent causes, and immediately connected with the death in one direct series of causes, then it is within the provision. It is not contended if intemperance is the remote cause, in the sense of simply rendering the system more susceptible to disease from which death ensues, that death in such a case is within the meaning of the exception. In any case, in order to bring it within the meaning of the provision, the intemperance must at least be the substantial cause immediately connected with the other cause or causes from which death ensues, and in such close sequence that the death is directly traceable to the intemperance as the operating cause.[38] The quantity of liquor which

[38] The nonuse of alcoholic stimulants or opium does not mean that the insured has never taken liquor or opium, and that he is ignorant

is drank by assured is not alone the test of the fact whether he was under the influence of intoxicating liquor; as in case where the testimony of those with him at the time he met with his accident was that they considered him sober.[39] If a certificate of insurance is issued by an order whose distinguishing feature is its requirement of daily abstinence from the use of liquors as a beverage, and if the application for such insurance contains an agreement that the assured will comply with all the laws, regulations, and requirements of the order and the certificate, a statement that it is issued upon the express condition that the assured shall in every particular while a member of the order comply with all its laws, rules, and requirements, the policy becomes forfeited and void upon the assured commencing the use of alcoholic liquors as a beverage. His suspension or expulsion from the order is not a condition precedent to such forfeiture.[40]

§ 2613. Intemperance—"If the Insured becomes so Far Intemperate as to Impair his Health."—A policy which provides that it shall be void if the insured becomes "so far intemperate as to impair health or induce delirium tremens" is avoided where the insured's death is substantially due to the use of intoxicants in excess, where they are not taken by medical advice or medical purposes, though it may appear he has not become habitually intemperate or had the delirium tremens.[41] It is for the jury to determine whether the death is caused by intemperance.[42] Where a policy of life insurance provides that it shall be void if the insured shall use

of the taste of either. Something more than an occasional or incidental use is implied. There must be to some extent a habit or custom in that regard, and one may occasionally indulge in liquor without having acquired a habit of so doing: Ancient O. U. W. v. Belcham, 48 Ill. App. 346, per Wall, J.

[39] Prader v. National Masonic Acc. Assn. (Iowa, 1895), 63 N. W. Rep. 601. In this case the deceased was injured by stepping into a hole, it appearing that he and two others had drank from a quart bottle of whisky, some of which was left, and on their return he also drank two glasses of wine, and thereafter met with the accident.

[40] Hogins v. Supreme Council, 76 Cal. 109; 9 Am. St. Rep. 173.

[41] Ætna L. Ins. Co. v. Davey, 123 U. S. 739.

[42] Ætna L. Ins. Co. v. Davey, 123 U. S. 739.

alcoholic drinks so as to injure his health, and that the insurer may cancel the policy when it comes to his knowledge that the insured has made false statements in this respect, or does so use alcoholic liquor, and that the policy shall be void if he dies from the effects of intoxication or while intoxicated, and the insurer's agent makes out a policy well knowing the insured to be an habitual drunkard, and afterward receives the premium without canceling the policy, the insurer thereby waives all the conditions in the policy except that making it void if the insured dies while intoxicated or from the effects of intoxication.[43] In a recent case in Minnesota it is held that the word "temperate," referring to the use of liquors, means the habits of the insured, and does not extend to exceptional or occasional instances, nor mean total abstinence, but merely abstinence from excessive or injurious use.[44]

§ 2614. Death—Intemperance—Waiver of Provision. A provision in a policy that the insurer will upon the death of the insured pay a certain amount if, in the opinion of the surgeon of the company, the insured did not die of intemperance, is a condition precedent to the right of recovery by those claiming under the policy.[45] A mutual benefit association issuing a certificate with a provision avoiding it in case the insured injured his health by the use of stimulants, with the right to cancel it during his life for such action, to a person known to its agent to be a confirmed drunkard waives its right to defend an action on the certificate on that ground.[46] In

[43] Newman v. Covenant Mut. Ins. Co., 76 Iowa, 56; 14 Am. St. Rep. 196.

[44] Chambers v. North Western M. L. Ins. Co. (Minn. 1896), 67 N. W. Rep. 367. If the representation is that applicant's habits are "sober and temperate," and insured became intemperate during the year preceding his death, but there was a division of medical opinion whether or not the risk was thereby materially increased, it was held that there was sufficient evidence of change of habits and an increase of risk to avoid the policy: Boyce v. Phœnix Mut. L. Ins. Co., 14 Supr. Ct. Rep. (Can.) 723, per Ritchie, C. J.; and Strong, J., Fourmer and Henry, J. J., dissenting; United States Mut. Acc. Assn. v. Newman (Va.), 3 S. E. Rep. 805.

[45] Campbell v. American Pop. L. Ins. Co.,1 MacAr. (Dist. Col.) 246.

[46] Newman v. Covenant M. B. Assn. (S. C. Iowa, 1888), 40 N. W. Rep. 87.

an action on an accident policy to recover for the death of the assured, where the defense was that the deceased fell from a window while drunk, evidence that shortly before the accident deceased did not appear to be drunk; that he was seen early the next morning and there were no signs of vomit on him; that when the attending physician first saw him he thought he was drunk, but the idea was quickly dispelled; that deceased took a glass of beer just before going home, and was not drunk then, and that he only had three glasses of beer, and never drank whisky—is sufficient to sustain the finding that deceased was not drunk at the time of the accident.[47]

§ **2615. Death—Intemperance—By-laws of Society.**—Where the by-laws of a society provided that no recovery could be had in case of death by intemperance, and the assured agreed in his written application to comply with the by-laws, it was held that no recovery could be had where the insured died from the excessive use of liquor.[48] A by-law of a benefit society that benefits shall be withheld from widows of members who die through intemperance or debauchery is not an unreasonable regulation. It does not aim to regulate behavior of members, but to prevent acts which increase the demand for relief.[49]

§ **2616. Death Caused by Submission to Illegal Operation.**—Though the policy may not expressly except liability where death is the result of an illegal operation, still no recovery can be had upon a policy of life insurance, on the ground of public policy, if death results from the insured having voluntarily submitted herself to an illegal operation, known to her to be dangerous to life, with intent to cause an abortion without any justifiable medical reason.[50]

§ **2617. Accident Policy—Injuries where no Visible Mark.**—A condition in an accident policy that it does

[47] Travelers' Ins. Co. v. Harvey (Va.), 5; S. E. Rep. 553.
[48] Hogins v. Supreme Council etc. (Cal.); 18 Pac. Rep. 125.
[49] St. Mary's Ben. Soc. v. Burford, 70 Pa. St. 321.
[50] Hatch v. Mutual L. Ins. Co., 120 Mass. 530; 21 Am. Rep. 541, 542.

not cover injuries of which there are no "external and visible signs of injury upon the body of the insured," extends only to bodily injuries not resulting in death.[51] Where an accident insurance policy contained a clause that "the benefits shall not extend to any bodily injury of which there shall be no external and visible signs upon the body of the insured," and the evidence showed that the body of the insured when found had bloody froth at the mouth, and spots of blood upon the face and breast, and red spots on the body, and the defendant asked the court to instruct the jury that if there were no visible signs of an injury upon the body of the insured, except the froth and red spots, it did not constitute visible and external signs of injury, it was held that this was a question of fact properly determined by the jury, and the instruction was rightly refused.[52] Insurance against accident, which it is stipulated shall not cover injuries of which there is no visible external mark upon the body of the assured, covers an accident of which there was no visible mark at the time of the injury, if there was such a mark afterward and as a result of the injury.[53]

§ 2618. Excepted Liability where Death or Injury "May be Caused by Intentional Injuries Inflicted by Assured or any Other Person."—An ordinary provision in accident policies is that exempting the insurer from liability in case the insured dies or suffers any disabilities which may have been caused by intentional injuries inflicted by the insured or any other person. Where a policy contains such a provision, no recovery can be had where injuries are inflicted by the insured intentionally, or when insane, or if he is murdered;[54]

[51] Paul v. Travelers' Ins. Co., 112 N. Y. 472; 20 N. E. Rep. 347; McGlinchey v. Fidelity etc. Co. (1888), 6 N. E. Rep. 450; 14 Atl. Rep. 13; Eggenberger v. Guarantee Mut. Acc. Assn., 41 Fed. Rep. 172.

[52] United States M. A. Assn. v. Newman (Va.), 3 S. E. Rep. 805.

[53] Pennington v. Pacific Mut. L. Ins. Co., 85 Iowa, 468; 30 Am. St. Rep. 306; 52 N. W. Rep. 482.

[54] Travelers' Ins. Co. v. McConkey, 127 U. S. 661; 32 L. ed., 308; Travelers' Ins. Co. v. McCarthy (Col.), 11 L. R. Annot. 297; 27 Pac. Rep. 713; De Graw v. National Acc. Soc., 4 N. Y. 912; 51 Hun (N. Y.), 342.

though there may have been no provocation for the killing, yet the policy is avoided.[55] So in Kentucky a condition in a life policy that no claim shall be made under the policy when death or injury is caused by intentional injuries inflicted by the assured or any other person bars a recovery where the assured is waylaid and assassinated for the purpose of robbery;[56] yet in a later case in this same state it is held that if an officer is shot by a prisoner, whom he is attempting to arrest, the death is within an exception of liability for "intentional injuries inflicted by the insured or any other person." [57]

§ **2619. Dueling or Fighting.**—If assured, being unarmed, is shot while engaged in an altercation, this is not within an exception of liability for death resulting from dueling or fighting, or happening while or in consequence of violating law, but the death is accidental.[58] Where the death of the insured is caused by a gunshot wound inflicted by another, and is the direct result of a mutual encounter or combat voluntarily entered into by them, no recovery can be had under a policy excepting the company from liability for death caused by fighting. In such case it is immaterial whether the slayer was sane or insane.[59]

§ **2620. Excepted Liability—Taking of Poison—Contact with Poisonous Substances—Inhaling Gas.**—A frequent provision in accident policies is that exempting the insurer from liability if death or injury be caused by "the taking of poison." Where a policy contains such a provision it has been held that if the insured takes poison by mistake the insurers are not discharged.[60] If the policy excepts the voluntary or involuntary taking of poison, it would seem that in such a case the insurer would be discharged where poison is taken by

[55] Fisher v. Travelers' Ins. Co. (Cal., 1888), 19 Pac. Rep. 425.

[56] Hutcheraft v. Travelers' Ins. Co., 87 Ky. 300; 12 Am. St. Rep. 484.

[57] American Acc. Co. v. Carson (Ky. C. A. 1895), 30 S. W. Rep. 879.

[58] Robinson v. United States Mut. Acc. Assn. (U. S. C. C. E. D. Mo. 1895), 68 Fed. Rep. 625.

[59] Gresham v. Equitable Acc. Ins. Co., 87 Ga. 497; 27 Am. St. Rep. 263.

[60] Pollock v. United States Mut. Acc. Assn., 102 Pa. St. 230; 48 Am. Rep. 2. But see Hill v. Hartford Acc. Ins. Co., 22 Hun (N. Y.), 187.

mistake,[61] but in Illinois a contrary view has been taken.[62] Where a policy excepted the insurers from liability "where death was caused by taking poison, or by the contact with poisonous substances," and the insured died from the effect of inhaling coal-gas, concerning which the testimony was conflicting as to whether or not it was a poison or poisonous substance, it was held no error on the part of the trial judge to refuse to instruct that inhaling coal-gas was a taking of poison if they believed coal-gas to be a poisonous substance, which when inhaled destroyed life.[63] It has been held that the "breathing of gas" by the insured involuntarily is not an "inhaling of gas."[64] The exception of liability in case death occurs from the "inhalation of gas" refers to the voluntary inhaling of gas by the insured. A condition against "inhalation of gas" in an accident policy is used to designate the common uses of gas in dentistry and surgery, and contemplates a voluntary and intelligent act on the part of the insured, and not an involuntary and unconscious act; as the inhalation of a deadly gas that has unexpectedly accumulated in a well.[65]

§ 2621. Poison or Anything Accidentally Taken or Inhaled.—A provision in an accident policy that it shall not "extend to poison in any way taken, administered, absorbed, or inhaled" does not relate to the motive of the insured in taking it, but rather to the mode or manner in which the poison is taken, and therefore a death by involuntary poisoning is not excluded from the risks covered by the contract of insurance.[66] An exception of liability in case of death or disablement arising from "anything accidentally taken, administered, or inhaled" does not cover death from accidentally inhaling illuminating gas escaping into the room in which assured is sleeping. Such a clause is clearly intended to ex-

[61] Cole v. Accident Ins. Co., 61 L. T., N. S., 227.

[62] Mutual Acc. Assn. v. Tuggle, 39 Ill. App. 509.

[63] United States Mut. Acc. Assn. v. Newman (Va.), 3 S. E. Rep. 805.

[64] Paul v. Travelers' Ins. Co., 112 N. Y. 472; 8 Am. St. Rep. 758.

[65] Prikett v. Pacific Mut. L. Ins. Co., 144 Pa. St. 79; 27 Am. St. Rep. 618; 22 Atl. Rep. 871; 21 Ins. L. J. 64.

[66] Metropolitan Acc. Assn. v. Froiland (Ill. S. C. 1896), 43 N. E. Rep. 766.

empt the insurer only in case the insured has voluntarily and consciously, but accidentally, taken or inhaled, or where something has been voluntarily administered which was injurious or destructive of life. The controlling idea in such a provision is the performance of a voluntary act which accidentally causes insured's death, nor does it refer to a thing involuntarily and unconsciously administered. The particular accidents intended to be excepted are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial or at least harmless.[67] A provision in a policy that the insurance does not cover "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not include in its meaning an accidental asphyxiation by illuminating gas escaping into the room where insured slept, and a recovery may be had.[68]

[67] Mennelley v. Employers' Liability Assur. Co., 148 N. Y. 596; reversing 72 Hun (N. Y.), 477; 54 N. Y. St. Rep. 780. So much of the above as expresses the reason for the decision are extracts taken from the opinion of the court, per Martin, J. The case of Paul v. Travelers' Ins. Co., 112 N. Y. 472, is declared to be the same as to the facts as that at bar, and the cases of Bacon v. United States Mut. Acc. Assn., 123 N. Y. 304, 308, and Pickett v. Pacific M. L. Co., 144 Pa. St. 79, 91, are cited with approval as following the Paul case and as recognizing its doctrine as correct. The court also adds: "The inhaling of gas having been specially provided for when taken for surgical and like purposes, it is only when it is inhaled for some other purpose or under other circumstances that the general provision applies. The special provision is applicable when gas is inhaled for surgical and like purposes; the general provision applies when it is inhaled for other purposes": Id. 601.

[68] Fidelity & Casualty Co. v. Waterman (Ill. S. C. 1896), 44 N. E. Rep. 283; affirming 59 Ill. App. 297. The court said: "It is urged that the exception in the case at bar is broader and more sweeping than the words found in the cases heretofore decided, the words here being 'poison or anything accidentally or otherwise absorbed or inhaled,' and that these words necessarily include every possible way by which irrespirable gases can be got into the human system so as to cause death. The additional word 'absorbed,' found in the language last above quoted, has no application to the case before us, for that word manifestly has reference only to the process of absorption by sucking up or imbibing through the pores of the body. The claim made is not well grounded if the correctness of the point decided in the cases we have mentioned be conceded. That point, as we un-

Death by involuntary poisoning is within an exception of liability against poison "in any way taken," these words referring not to the assured's motive in taking poison, but to the manner of taking it.[69] An exception of liability from death from "taking poison" means the voluntary, intentional taking of poison, and does not include cases of accidental poisoning, and drinking carbolic acid by mistake for peppermint is not within the exemption.[70]

derstand it, is that the word 'inhaling,' or 'inhalation,' or 'inhaled,' as used in exceptions contained in these policies of life or accident insurance implies a voluntary and intelligent act, as distinguished from an involuntary and unconscious act. Read in the light of the decisions, the words now in question do not mean otherwise than if they explicitly read 'poison or anything accidentally or otherwise consciously and by act of volition drawn into the system by inspiration.' This view is fully supported by a late decision of the court of appeals of New York. . . . . Referring to Menneilly v. Employers' L. Assur. Corp., 43 N. E. Rep. 54. And we may add that this Menneilly case which had then been just published was cited by this court with approval in Insurance Co. v. Dunlap, supra."

[69] Metropolitan Acc. Assn. v. Froiland (Ill. Sup. Ct. 1896), 43 N. E. Rep. 766.

[70] The Travelers' Ins. Co. v. Dunlap, 160 Ill. 642; affirming 59 Ill. App. 515. The court, per Carter, J., notes the case of Pollock v. United States Mut. Acc. Assn., 102 Pa. St. 230, which holds that taking poison includes accidental as well as intentional taking. It also considers Healey v. Mutual Acc. Assn., 133 Ill. 556, and says: "While the precise point here at issue was not discussed in the opinion in the Healey case, yet it was involved in the decision, and is within the reasoning there employed. The leading cases on this subject were reviewed in the Healey case, including Paul v. Travelers' Ins. Co., 112 N. Y. 472, and Pollock v. United States Mut. Acc. Assn., 102 Pa. St. 230, and it was then said (p. 564): 'While we recognize the high ability of the court in which the case [the Pennsylvania case] was decided we are not disposed to follow the rule there adopted. We think the rule established by the court of appeals of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question." See, also, Pickett v. Pacific Mut. L. Ins. Co., 144 Pa. St. 79; Menneilly v. Employers' L. Assur. Corp., 148 N. Y. 596; 43 N. E. Rep. 54. We are inclined to the opinion that the term 'taking poison' would also, in common parlance, when used without any qualifying words, be understood to mean an intelligent and conscious act. If, in speaking of the cause of the death of another, we should say, 'he took poison,' we would most commonly

§ 2622. **Entering or Leaving Moving Train.**—No recovery can be had under an accident policy which provides that the company is not liable for accidents received while trying to enter a moving steam vehicle where the insured is killed

be understood to mean that his act in taking poison was intentional, rather than accidental, and it would hardly be deemed necessary to say, 'he intentionally took poison,' and if it were designed to avoid any such understanding, we would naturally say, 'he accidentally took poison,' or would use some other qualifying words indicating that the act was accidental or its cause doubtful or unknown. It must, however, be conceded that the meaning of the term in the respect mentioned is not free from doubt. Able and learned arguments have been made on each side of the question by counsel, and cases are cited showing that courts of high authority do not agree on the subject. It would, therefore, seem to be eminently proper in such a case to apply the well-known rule of construction applicable to such instruments that where there is a doubt or uncertainty as to the meaning of the terms employed, the language, being that of the insurer, must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity which in making the insurance it was his object to secure: Niagara F. Ins. Co. v. Scammon, 100 Ill. 644; Healey v. Mutual Acc. Assn., 133 Ill. 556; May on Insurance, sec. 175. Counsel for appellant insist that, using their own language, 'an exception from an accident policy can only be of some accident otherwise included within it, for if the cause of injury or death be not accidental it is manifestly not within the scope of the policy at all. Hence, an exception of "taking poison" means ex vi termini the exception of an accidental taking of poison.' It is clear, however, that the so-called exception is something more than a mere exception excluding what would otherwise be included as accidents, for suicide by a sane person could not be said to be an accident, yet it with other causes of death and injury not accidental is embraced in the exception. It is also said that the term 'taking poison' cannot be limited in its meaning to the intentional taking of poison, for the reason that death so caused is covered by the clause relating to suicide, and to so construe it would give no force whatever to the words 'taking poison.' Counsel are mistaken, also, in this contention. When the entire provision in which these words occur is considered, it is too clear for argument that it is recognized that death may result wholly or partly, directly or indirectly, from voluntarily taking poison without any suicidal intent, and that death so caused, while excepted from the risks covered by the policy, would not be so excepted by the suicide clause. Besides, different kinds of accidents and injuries not resulting in death caused by the voluntary taking of poison might be excluded from such risks by this provision. It would not be difficult for the insurer to use language which, in respect to the question here under

while attempting to enter a moving train.[71] Where an accident policy contained the following condition: "This insurance does not cover entering or trying to enter or leave a moving conveyance using steam as a motive power; . . . . railroad employees excepted," and assured was baggage-checker of a transfer company, and his business required him to meet and board incoming trains, and check baggage to other railroad lines and to residences in Vicksburg, it was held that the assured was a railroad employee within the meaning of the foregoing exception.[72] The fact that insured is found dead near the platform crushed by a wheel of a train on which he was a passenger, and at a station short of his destination, throws the burden of proof upon insurer that insured was killed on the platform or in getting on a moving train, within that exception, and the question is one of fact for the jury.[73] Jumping from a moving train after it has passed the station is a voluntary, unnecessary exposure to danger.[74] Where there is evidence tending to show such fact it is error to refuse to instruct the jury to the effect that if insured received his injuries while entering or trying to enter a moving conveyance using steam as a motive power he could not recover, or if he received such injuries while riding in or upon such a conveyance not provided for the transportation of passengers, he could not recover, and in such case the court might have instructed the jury that if insured received the injury while he was voluntarily exposing himself to unnecessary danger he could not recover, although it is held not prejudicially erroneous to refuse the last request to instruct, where there is an instruction that if insured had a right to attend to certain duties connected

consideration, would be free from doubt. A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent and of quite a different one in the hands of the adjuster."

[71] Miller v. Travelers' Ins. Co. (Minn. 1888), 40 N. W. Rep. 839.

[72] Cotten v. Fidelity & Casualty Co., 41 Fed. Rep. 506.

[73] Anthony v. Mercantile M. A. Assn., 162 Mass. 354; 38 N. E. Rep. 226.

[74] Smith v. Preferred Mut. Acc. Assn. (Mich. 1895), 62 N. W. Rep. 990.

with his business as shipper, and was injured while so doing, his loss was a risk taken by the insurer, "provided he acted with the prudence of a man of ordinary intelligence and prudence placed in like circumstances." [75]

§ 2623. **Rules and Regulations of Common Carriers and Employer—Violation of "A Rule of Corporation."**—If the contract exempts insurer from liability, whether death results from violation of a rule of a corporation, or provides for insurance while traveling in or by a public conveyance provided by a common carrier, and stipulates by way of exception only for liability upon compliance with all rules and regulations of such carriers, these words mean that the assured is only bound to observe strict rules as a general traveler might reasonably be presumed and ought to know; he is not obligated to familiarize himself with and constantly bear in mind all the rules and regulations and details of management of trains or other conveyances of common carriers. Some additional obligations may, however, be imposed, perhaps, upon the traveler where the contract stipulates for the observance of due care or the like on the part of assured. The courts will also consider the circumstance whether such rules, even if they are known or ought to be known by assured, are nevertheless constantly violated by passengers and employees; in such case such rules cannot fairly be deemed to be in force and necessary to be observed by assured, for the contract, although between assurer and assured, must necessarily have reference to such rules only as are of binding obligation.[76] If the insured be an employee, a greater obligation might reasonably be held to rest upon him to inform himself as to the rules of employment than in case of a traveler by conveyances provided by common carriers. In case, however, of an exemption from liability for violating the rules of employment, no

[75] Travelers' Ins. Co. v. Snowden, 45 Neb. 249; 63 N. W. 392.

[76] Tooley v. Railway Pass. Assur. Co., 3 Biss. (C. C.) 399; Bon v. Railway Pass. Assur. Co., 56 Iowa, 664; 41 Am. Rep. 127; Marx v. Travelers' Ins. Co., 39 Fed. Rep. 321; 6 R. R. & Corp. L. J. 322. See Sutherland v. Standard L. & A. Ins. Co. (Iowa, 1893), 54 N. W. Rep. 453.

obligation rests upon the assurer to inform assured as to such rules.[77]

§ **2624. Voluntary Exposure to Obvious or Unnecessary Danger.**—Most policies of accident insurance contain either the condition that the insurers will not be liable in case of death or injury resulting from "voluntary exposure to unnecessary danger," or one of similar import. In construing such a provision a Massachusetts court[78] has said: "If a person voluntarily places himself in a position where he is exposed to an obvious danger, and the precise injury happened to him which there is reason to fear, it cannot fairly be held that the language of the policy was not intended and understood to be applicable to such a case." In other words, if the insured voluntarily places himself in such a position where from the surrounding circumstances a person of ordinary prudence and caution would reasonably hesitate to place himself for fear of danger to life or body, then there can be no recovery for injuries or death in consequence of such act. The provision does not refer to exposure to hidden dangers where a person of ordinary prudence would see no reason for fear.[79] In an action upon an accident policy which excepted injuries caused

[77] Follette v. United States Mut. Acc. Assn. (N. C. 1892), 14 S. E. Rep. 923; Standard Life & Acc. Ins. Co. v. Jones, 94 Ala. 434; 10 S. Rep. 530. See Providence Life etc. Ins. Co. v. Martin, 32 Md. 310. See Bon v. Railway Pass. Assur. Co., 56 Iowa, 664; 41 Am. Rep. 127.

[78] Tuttle v. Travelers' Ins. Co., 134 Mass. 175.

[79] Upon this point the court said in a case in Pennsylvania (Buckland v. Travelers' Ins. Co., 102 Pa. St. 262): "A clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto, without any knowledge of the danger, does not constitute a voluntary exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the action does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental." "Voluntary exposure to unnecessary danger," as used in an accident policy, means an act done in obedience to and regulated by the will of the person who does it; that is, an act done designedly and not accidentally: Lehman v. Great Eastern C. & I. Co. (N. Y. Supr. Ct. App. Div., 1896), 39 N. Y. Supp. 912.

by "voluntary exposure to unnecessary danger," it appeared that the insured sat on a bag on the railroad track with his back to the curve, and that a train suddenly came around the curve, and on warning the insured started off, but reached to get his bag, and as he did so the engine struck him. There was no evidence showing that insured knew or had good reason for knowing that any train would be along at that time. It was held that the act of the insured was not within the exception.[80] Walking on a dark night over a railroad trestle where there is no railing is voluntary exposure to unnecessary danger.[81] Where a person stood at a railroad crossing and waited for a train to pass, and then, without taking the precaution to notice the train which was coming toward him from another direction, started to cross the tracks and was killed, it was held not a "voluntary exposure" to danger.[82] Whether crossing a railroad track in front of an advancing train is or is not "negligence" or "voluntary exposure to unnecessary risk" is a question materially dependent upon the distance to be covered by the individual, the distance to be covered by the train, and the speed at which the latter is approaching, and where the evidence is conflicting upon these points there is no error in leaving the jury to pass upon the conflicting proof.[83] Where the train on which deceased was a passenger stopped short of his destination, and after it started he was found crushed by the car-wheels between the station platform and the nearest rail, it was held that this did not show as a matter of law that death resulted from voluntary exposure to unnecessary danger.[84] Being shot after leaving a bawdyhouse does not release the insurer as being "unnecessary exposure to dan-

[80] Fidelity & Casualty Co. v. Chambers (Va. 1896), 24 S. E. Rep. 896.

[81] Follis v. United States Mut. Acc. Assn. (Iowa, 1895), 62 N. W. Rep. 807.

[82] Lehman v. Great Eastern C. & I. Co. (N. Y. Supr. Ct. App. Div. 1896), 39 N. Y. Supp. 912.

[83] Traders' & Travelers' Acc. Co. v. Wagley (U. S. C. C. A. 2d Cir. 1896), 74 Fed. Rep. 457, 459, per Lacombe, C. J.

[84] Anthony v. Mercantile M. A. Assn., 162 Mass. 354; 38 N. E. Rep. 226.

ger."[85] The word "exposure," as used in policies of insurance, indicates danger of destruction or injury to the property insured from external sources not inherent in the property itself.[86]

§ 2625. **Walking or Being on Railway Bridge or "Roadbed."**—The phrase "walking or being on a railway bridge or roadbed," under an exception in an accident policy of liability for injuries or death caused thereby, is not to be construed with absolute literalness. The condition is a warranty by assured that he will not intrude upon that part of the roadbed which is not also a part of the highway or public thoroughfare; that he will not loiter upon the track, but does not obligate him not to cross a railroad bed at the place provided for the public to cross at, and if one crosses a track at a station where the public is accustomed to cross, he is not "walking on a railway roadbed" in any such sense as will entitle the insurer to avoid the policy irrespective of proof of such person's negligence in so crossing.[87] The term "roadbed" does not include a space of ten feet between the railroad tracks.[88] Death caused by being struck by an engine and killed while walking between the tracks of a railway, there being a sidewalk parallel thereto, is within the exception against walking or being on the roadbed of any steam railway, and it is immaterial that other people used the roadbed in the same manner.[89] If one is killed while attempting to cross a railroad track at the station which the public commonly crossed only with the company's permission, such death is within the provision "walking or being on the roadbed," and

[85] Jones v. United States Mut. Acc. Assn. (Iowa, 1895), 61 N. W. Rep. 485.

[86] Davis v. Western Home Ins. Co., 81 Iowa, 496; 25 Am. St. Rep. 509.

[87] Traders & Travelers' Acc. Co. v. Wagley (U. S. C. C. A. 2d Cir. 1896), 74 Fed. Rep. 457, 458, per Lacombe, C. J.; citing Duncan v. Association (N. Y. Supr. Ct.), 13 N. Y. Supp. 620.

[88] Meadows v. Pacific Mut. L. Ins. Co., 129 Mo. 76; 24 Ins. L. J. 721; 31 S. W. Rep. 578.

[89] Piper v. Mercantile Mut. Acc. Assn., 161 Mass. 589; 37 N. E. Rep. 759.

under the stipulation of the policy the beneficiary is entitled only to the death loss provided in the classification of railroad employees.[90]

§ 2626. Instances within the Exception of "Voluntary Exposure."—Recovery on a policy containing such a provision has been held to be defeated where the insured on a dark night attempted to cross a trestle which he knew to be dangerous, though this was his customary route to his home.[91] So, also where the insured attempted in broad daylight to cross a railroad track in front of an approaching train, there being no obstruction to his view, recovery was denied.[92] Where the insured died from the result of injuries received in jumping through a window to escape arrest the policy was held to be avoided.[93] In another case the insured was killed by a railway train while he was running on the track in front of it in the night to get on a train approaching in the other direction on a parallel track, and it was held that there could be no recovery.[94] Where death ensued in consequence of the insured having fallen from the platform of a railway car late at night, while the train was in full motion, the policy was held avoided.[95] In another case where the insured, who was walking along a street through which a railroad ran in company with two others whom he met, failed to look out for the engine, there being an approaching train, and then turned, went back a short distance, and "squatted down" upon the track, the engine being twenty-five feet distance at the time, and was struck and killed, it was held to be clearly a case of voluntary exposure to unnecessary danger, there being no evidence whatever showing it to be an accident.[96]

[90] Keene v. New England Mut. Acc. Assn., 164 Mass. 170; 24 Ins. L. J. 796; 41 N. E. Rep. 203.

[91] Travelers' Ins. Co. v. Jones (Ga.), 7 S. E. Rep. 83.

[92] Cornish v. Accident Ins. Co. (Eng. Ct. App.), L. R. 23 Q. B. Div. 453; 41 Alb. L. J. 26.

[93] Schaffer v. Travelers' Ins. Co., 31 Ill. App. 112; 22 N. E. Rep. 589.

[94] Tuttle v. Travelers' Ins. Co., 134 Mass. 175; 45 Am. Rep. 316.

[95] Sautelle v. Railway Pass. Assur. Co., 15 Blatch. (C. C.) 216.

[96] Williams v. United States Mut. Acc. Assn. (N. Y. C. A. 1892), 44 N. Y. St. Rep. 238; 31 N. E. Rep. 222; 46 Alb. L. J. 73; 21 Ins. L. J. 609.

§ 2627. Instances not within the Exception of Voluntary Exposure.—It is not a case of "voluntary exposure" where the insured while asleep involuntarily does some act resulting in injury; as where the insured while traveling by railway, being asleep and unconscious, voluntarily arose and walked to the car platform, from which he fell and received injuries.[97] It is held not to be "voluntary exposure" where the insured, who is running toward an approaching train in order to get the mail-bags, stumbles and falls against the engine.[98] And where the insured who, while standing on a platform not intended for use in getting upon trains, is either thrown or falls upon the track, it is held not within the meaning of the provision.[99] An attempt to rescue a crew of a ship which has been driven ashore is held not to be within the exception, since it is the duty of a person in such case to extend help and aid.[100] Where an accident policy excepted death or injury "by voluntary exposure to unnecessary danger," and "while walking on the roadbed or bridge of any railroad," and the insured stepped off a railway train which had stopped at a drawbridge at night, fell through a concealed hole in the bridge, and was killed, it was held not within the exceptions.[101]

§ 2628. Death by Disease Excepted—Fits.—An ordinary provision of accident policies is that excepting the insurer from liability in case injury or death arises from injury or disease. In an action upon a policy containing such a provision it was held that death resulting from malignant pustule, caused by contact with putrid animal matter containing bacteria of the kind known as "bacilli anthrax," is death from disease, and not from accidental means.[102] And likewise, if

[97] Schneider v. Travelers' Ins. Co., 58 Wis. 13; 46 Am. Rep. 618.

[98] Equitable Acc. Ins. Co. v. Osborn (Ala. S. C. 1891), 9 S. Rep. 869; 44 Alb. L. J. 304.

[99] Bowden v. Massachusetts Mut. Acc. Assn. (Mass.), 20 Ins. L. J. 716; 27 N. E. Rep. 769.

[100] Tucker v. Mutual Ben. L. Ins. Co., 50 Hun (N. Y.), 50.

[101] Burkhardt v. Travelers' Ins. Co., 102 Pa. St. 262; 48 Am. Rep. 205.

[102] Stedman v. United States Mut. Acc. Assn. (N. Y.), 9 L. R. Annot. 617. But see c. lx. and sec. 2878, herein.

any impure or poisonous substance or matter enters the body which produces some disease from which death results, it will be within the excepted liability of death by disease.[103] Where an accident policy excepted death arising from "fits . . . . or any disease whatsoever," and the insured, while at a railway station, was seized with a fit, and, falling across the tracks of the railway, was run over by a passing train and killed, it was held to be death by accident, and not a death within the exception.[104] So also where the policy provided that it should not extend "to any injury caused by or arising from natural disease, or weakness or exhaustion consequent upon disease," and the insured while crossing a stream was seized with an epileptic fit, and falling into the water was drowned, it was held not to be within the exception.[105] The insurer is liable in an accident policy for death the result of peritonitis, caused by a fall, though the policy excepts death in consequence of disease, and though it may appear that the insured previously had peritonitis and was peculiarly liable to a recurrence of the disease.[106]

§ 2629. Disease Caused by Accident—Death Superinduced by Other Causes not Death by Excepted Disease.—If a disease is primarily, solely, and directly caused by external violence, and death ensues by reason of a surgical operation for the purpose of relieving the patient, it is a death "accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death," and it is not within an exception of liability for death or disability arising from specified diseases "within the system of the insured before or at the time or following such accidental in-

[103] Bacon v. United States Mut. Acc. Assn., 123 N. Y. 304; 44 Hun (N. Y.), 599.

[104] Lawrence v. Accidental Ins. Co., Lim. (1881), L. R. 72; Q. B. D. 216.

[105] Winspear v. Accidental Ins. Co., Lim. (1880), L. R. 6 Q. B. D. 42. See, also, Reynolds v. Accidental Ins. Co., 22 L. T., N. S., 820, where the insured was seized with a fit while bathing and was drowned.

[106] Freeman v. Mercantile Acc. Assn. (Mass. 1892), 3 N. E. Rep. 1013.

jury, whether causing such death or disability directly or jointly with such accidental injury." [107]

§ 2630. Death from Disease as a "Secondary Cause" not Death by Accident.—If an injury or disease is primarily caused by accidental means, yet if death is superinduced by a disease enumerated among those excepted as not insured against, it is within an exception of liability for death or disability arising from specified diseases, "or secondary cause or causes arising within the system of the insured before or at the time and following such accidental injury, whether causing such death or disability directly or jointly with such accident or injury." [108]

§ 2631. Death Caused by "Medical Treatment for Disease" Excepted.—If the policy provides that the company

[107] Here the policy insures against cuts, stabs, concussions, etc, "accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured or disability to follow his avocation," and then follows this exception: "But it does not insure against death or disability arising from . . . . hernia . . . . or any other disease arising within the system of the insured before or at the time or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury." And it was decided that death from hernia, caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient, was not within the above exception: Fitton v. Accidental Death Ins. Co., 17 Com. B., N. S., 122; 2 Big. L. & A. Ins. Rep. 649; 34 L. J. C. P. 28; approved in Smith v. Accidental Ins. Co., noted next section.

[108] In Smith v. Accident I. Co., L. R. 5 Ex. 302, 39 L.J.Ex.211 (1870), although approving the case under last section, it was distinguished by some of the members of the court. In this case the insurance was against accidents from cuts, etc. The insured died from erysipelas caused by an accidental cut, but the condition differs from the case under the last section in that it reads, "When accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, ... but it does not insure against death or disability arising from . . . . erysipelas or any other disease or secondary cause or causes arising within the system of the insured before or at the time or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury," etc.

will not be liable for death "caused wholly or in part by . . . . medical treatment for disease," it will not be liable where the insured, by accident or inadvertence, takes a larger quantity of the medicine prescribed for him than is specified, and death results therefrom. Thus, where a specified quantity of opium had been prescribed for a person insured under a policy containing such a condition, and he by mistake took such a quantity as produced death, it was held to be death wholly or in part by medical treatment for disease, and the insurers were held to be released from liability.[109]

§ **2632. Occupation—Exception of Liability for "Wrecking."**—One who is insured as engaged in a particular occupation is nevertheless within the protection of the policy, although he engages in a work of humanity, such as assisting in saving a shipwrecked crew, whereby he comes to an accidental death by drowning, and his humane act does not make his occupation that of "wrecking" or a "wrecker" within an exception of liability while engaged in "wrecking." [110]

§ **2633. Accident to Property—Loss by Fire Excepted.** If a policy is issued upon property insuring it against accident, but excepting loss or damage by fire, any loss to the property of which fire is the proximate cause will be within the exception. Thus, where a policy upon glass insured "against loss by breakage by accident or causes entirely uncontrolled by the insured, but excepted" loss or damage which may happen by or in consequence of any fire, it was held that the breakage of glass caused by the falling wall of another building, which fell in consequence of a fire, was within the exception, as the fire was the proximate and immediate cause of the loss.[111] In another case a policy which was issued upon a sugar refinery covered loss by "explosion or accidents," and on the back of the policy limited the term "explosion" to "rupture of the

[109] Bayliss v. Travelers' Ins. Co., 14 Blatchf. (C. C.) 143.

[110] Tucker v. Mutual Ben. L. Ins. Co. of Hartford, 50 Hun (N. Y.), 50; 4 N. Y. Supp. 505.

[111] Runkel v. Lloyd's P. G. Ins. Co. (Parish of Orleans C. A. 1892), 21 Ins. L. J. 472.

skull of the shell or flues of the boiler or boilers, caused by the action of steam." The policy also provided that the insurer should not be liable for any "explosion or loss caused by the burning of the building, ... or for any loss or damage by fire resulting from any cause whatever." A fire occurred, and while endeavoring to put it out certain inflammable materials which were stored, upon coming in contact with the flames, exploded. In an action to recover it was held that the loss was not by "accident" within the meaning of the policy, and within the exception, and that the insurer was not liable for the loss caused directly by the explosion and from the fire which ensued.[112]

§ **2634. Plate-glass—Tornado Insurance.**—Injury to plate-glass as such is declared in Massachusetts to be more particularly within that class of insurance known as "casualty insurance," rather than to belong to what is known in the statutes of that state as "accident insurance."[113] The destruction of a plate-glass front which is immovable is a peril within a tornado insurance policy, although the policy exempts the insurers from liability for injury to plate-glass in doors and windows of nine square feet or more unless the same is separately and specifically insured, and this is so even though the plate-glass front in question exceeds the size specified.[114]

§ **2635. Effect of Words "Sane or Insane" in Suicide Clause.**—In order to avoid the question as to what is meant by the words "suicide" or "death by his own hand," or by words of like effect, the insurers have generally added the words "sane or insane" to the proviso. Under these words it is held that if the insured kills himself the policy is avoided, though he may have been of unsound mind and

[112] Chicago Sugar Refinery Co. v. American Steam Boiler Co., 57 Fed. Rep. 293; 21 L. R. Annot. 572; reversing 48 Fed. Rep. 198; 21 Ins. L. J. 59.

[113] Employers' Liability Ins. Corp. v. Merrill, 155 Mass. 404; 29 N. E. Rep., per the court, under Acts Mass. 1887, c. 214, sec. 29, cl. 5.

[114] Hale v. Springfield F. & M. Ins. Co., 46 Mo. App. 508.

wholly unconscious of the moral nature of the act done.[115] Thus, where a policy of life insurance provided that in case of the death of the insured by his own act or intention, whether "sane or insane," the company should be liable only for the net value of the policy at that time, it was held that this provision embraced an intentional self-destruction by a man so far insane that he was conscious at the time of the physical nature and consequences of his act, and intended to destroy his life, even though he was not conscious of the moral quality or consequences of the act.[116] In a Michigan case[117] the proviso was "died by his own hand, sane or insane," and the court, per Champlin, J., approved the opinion of Davis, J., in Bigelow v. Berkshire Life Insurance Company,[118] and declared that "the policy covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane. If the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its commission." So also in a subsequent case in this state,[119] under a condition against "suicide . . . . whether the member at the time of committing suicide be sane or insane," it was held that if the insured was aware of the physical consequences of his act, the policy was avoided, though he might be insane, and the court declared that if insured had sufficient intelligence to adjust a rope and hang himself, he had enough " 'capacity' to understand the physical nature and consequences of his act." [120] If, owing

[115] Bigelow v. Berkshire L. Ins. Co. (1876), 93 U. S. (3 Otto) 284; 19 Am. Rep. n. 628; Scarth v. Security M. L. Ins. Soc. (1888), 75 Iowa, 346; 39 N. W. Rep. 658; DeGorgorza v. Knickerbocker L. Ins. Co. (1875), 65 N. Y. 232; Pierce v. Travelers' L. Ins. Co. (1874), 34 Wis. 389; Chapman v. Republic L. Ins. Co. (1874), 6 Biss. (C. C.) 238; Salentine v. Mutual Ben. L. Ins. Co. (1885), 24 Fed. Rep. 159.

[116] Adkins v. Columbian L. Ins. Co. (1879), 70 Mo. 27; 35 Am. Rep. 410.

[117] Streeter v. Western Union etc. Soc. (1887), 65 Mich. 199; 8 Am. St. Rep. 882; 31 N. W. Rep. 779.

[118] 93 U. S. 284.

[119] Sabin v. Senate of the National Union, (1892), 90 Mich. 177; 51 N. W. Rep. 202, per Morse, J.

[120] Under the added provision "sane or insane," "no kind or degree of insanity will prevent an avoidance, and the courts, not only in

to uncontrollable physical and mental weakness, the assured takes an overdose of whisky, which kills him, this is not dying by his own hand, sane or insane.[121] In a case in Vermont,[122] where an accident policy excepted death from suicide, "sane or insane," it was held that the court would not attempt to measure the degrees of insanity, as the provision referred to suicide without regard to the insured's mental condition when he committed the act, and that a recovery was precluded even though assured acted under an insane impulse overcoming his will. In a New York case[123] the condition "die by his own hand, sane or insane," is held to cover suicide by one utterly bereft of reason.[124]

England but in this country, have almost universally held that with such provisions in policies of life insurance the policies are void if insured comes to his death by his own hand": Blackstone v. Insurance Co. (1889), 74 Mich. 611, per Long, J., in opinion.

[121] Northwestern Mut. L. Ins. Co. v. Hazlett, 105 Ind. 212; 55 Am. Rep. 192.

[122] Billings v. Accident Ins. Co. of North America, (1892), 64 Vt. 78; 24 Atl. Rep. 656; 21 Ins. L. J. 605; 46 Alb. L. J. 217 (two judges dissenting).

[123] De Gorgorza v. Knickerbocker L. Ins. Co. (1875), 65 N. Y. 232.

[124] In the case of Bigelow v. Berkshire Ins. Co., 93 U. S. 284, decided in 1876, and the condition was, "shall die by suicide (sane or insane)," and the court, per Davis, J., said: "For the purposes of this suit, it is enough to say that the policy was rendered void if the insured was conscious of the physical nature of his act and intended by it to cause his death, although at the time he was incapable of judging between right and wrong and of understanding the moral consequences of what he was doing": Chicago Guaranty Fund L. Soc. v. Wilson (1893), 55 Ill. App. 138. The condition here was, "that death by self-destruction, whether sane or insane, or death caused or superinduced by drunkenness or by the use of narcotics or opiates within three years from the date of the policy herein applied for, are risks not assumed by the society." The defense that insured intentionally destroyed his own life by poison administered by his own hand was relied on, but the verdict for plaintiff was set aside as against the evidence. The question as to what constitutes suicide was not discussed; the court, per Boggs, P. J., said: "We content ourselves therefore with the declaration that the evidence established the fact to be that the deceased voluntarily and intentionally ended his own life. Instructions as to the liability of the society under such stipulations in a policy when death is caused by an insane impulse were not asked. There was no evidence on which to base them." See sec. 2637, herein.

§ 2636. "Sane or Insane"—That Suicide Committed Deliberately or Hastily Immaterial.—If a policy stipulates for exemption from liability on the part of the insurer in case of suicide or self-destruction, sane or insane, it is immaterial whether the act was committed deliberately or hastily.[125]

§ 2637. Suicide "Felonious or Otherwise, Sane or Insane."—Under a provision in a policy that the insurers are "not liable in case the insured shall die by suicide, felonious or otherwise, sane or insane," the insurers will be discharged if the death is caused by the voluntary or willful act of the insured, when he is able to understand the physical nature of the act and the consequences thereof. The fact that he does not understand the moral character of the act is not relevant, except in so far as may help to ascertain the extent of his capacity to understand the physical nature of the act. Such clause also includes every case of intentional self-destruction, and every case of suicide which is a voluntary act, and the natural, ordinary, and direct tendency of which is to produce death.[126] So under a federal case if a policy provides

[125] Union Central L. Ins. Co. v. Hollowell (Ind. 1896), 43 N. E. Rep. 277. The policy provided against "self-destruction by the insured, whether sane or insane." The court below instructed the jury that if assured died from arsenic poison, such fact would not be sufficient to defeat the policy, "unless you also find from all the evidence in this case by a fair preponderance that said poison was deliberately and willfully taken by said Koehler with the intent to commit suicide," and the court, per Davis, J., on appeal says: "It was not incumbent on the appellant to prove that the act of self-destruction was with careful consideration. If the poison was hastily taken by him with the intent to commit suicide the condition of the policy was broken. The provision in the policy is that self-destruction, whether sane or insane, will void the policy. All that appellant was required to prove on this question was that said poison was taken by said Koehler with intent to commit suicide. If it was taken hastily or deliberately with such intent, whether sane or insane, there would be no recovery upon the policy. The conscious and voluntary act on the part of the assured in taking the poison with intent to take his own life, which resulted in death, was sufficient to defeat the claim of insurance, whether such act was committed deliberately or not."

[126] Pierce v. Travelers' Ins. Co. (1874), 34 Wis. 389; Suppiger v. Covenant Mut. B. Assn. (Ill. 1886), 20 Bradw. 595. The condition here was "die by reason of any act of self-destruction whatever, whether

that it shall be void in case the assured dies by "self-destruction, felonious or otherwise," the proviso is held to include self-destruction, sane or insane, as equivalent thereto.[127]

§ **2638. Suicide while Intoxicated.**—If the insured, while in an intoxicated condition, takes poison with the intent of destroying his life, the insurers will be discharged, though the intent is only the intent of a drunken person. It is nevertheless suicide or a dying by his own hand.[128]

§ **2639. Suicide—Accidental or Unintentional Self-killing.**—Accidental or unintentional self-killing is not suicide within the meaning of a clause excepting the insurer from liability in such cases. This has been universally so held and admitted. This rule may be illustrated by those cases where assured has accidentally been killed by his fowling-piece, or by drinking poison by mistake. So assured, while dazed or delirious from pain, or one diseased in mind, might meet with accidental death, he himself by his own act contributing thereto, as where one in the frenzy of delirium tears off a bandage from a wound or artery, causing death; but such acts would not be suicide within a provision against suicide. And even though the policy stipulates against liability of the insurer in case "the assured shall die by suicide, whether the act be voluntary or involuntary," such exception does not extend to death caused by an accident, nor does the fact that assured died under peculiar and suspicious circumstances aid the assurer where the jury finds that he did not commit suicide, even though the precise cause of death is left to conjecture, and there is no evidence as to whether it arose from poisoning or not.[129] In Keels v. Mutual Reserve Fund

at the time of committing the same he be sane or insane, whether felonious or otherwise." The court holds that if at the time of the commission of the act insured was insane to a degree that he was unconscious of the act or was driven thereto by an insane irresistible impulse the condition did not attach.

[127] Riley v. Hartford L. & A. Ins. Co. (1885), 25 Fed. Rep. 315.

[128] Equitable etc. Assur. Soc. v. Paterson (1870), 41 Ga. 338; 5 Am. Rep. 535.

[129] Edwards v. Travelers' L. Ins. Co. (1884), 20 Fed. Rep. 661; 22 Blatchf. (C. C.) 225; Pierce v. Travelers' Ins. Co. (1874), 34 Wis. 389.

Association[130] the condition was "death of a member by his own hand, sane or insane, voluntary or involuntary." The assured was found dead with a bullet-hole in his brain and a pistol in his open hand. He had been suffering from softening of the brain, and showed great and increasing mental aberration. He was found lying inside his pasture fence, the rails of which were ten feet high, and apparently he had climbed over it, and the exception was held not to include death from accident or unintentional self-killing.[131] So a policy conditioned to be

The condition here was "die by suicide, felonious or otherwise, sane or insane." "Where the parties insert in the contract 'that if the death is caused by the insured, sane or insane,' then there can be no recovery if he committed the fatal act otherwise than accidentally. Of course, if it was accidental it was not his act": Riley v. Hartford L. & A. Ins. Co. (1885), 25 Fed. Rep. 315, 316, per Treat, J.

[130] (1886), 29 Fed. Rep. 198.

[131] In Sargent v. Home B. Assn. (1888), 35 Fed. Rep. 711, the condition was: "Death of the member by his own hand or act, whether voluntary or involuntary, sane or insane, at the time is a risk not assumed by the association." There was a question as to estoppel and evidence, and the evidence was not inconsistent with death by accident. The words of the court, however, bear upon the point in the text. They are: "A man while dazed or delirious from pain might meet a self-inflicted but wholly accidental death. He might walk through a window, supposing it to be a door, or drink a poisonous draught, mistaking it for water, or discharge a pistol inadvertently, believing it to be some harmless instrument, or while holding it in hands rendered nerveless by the presence of disease, and yet a death so occasioned would not be within the clause in question": Id. 714, per Coxe, J.; citing Penfold v. Insurance Co., 85 N. Y. 317; Lawrence v. Mutual L. Ins. Co. (Ill. 1879), 5 Bradw. 280. The condition in this case was, "shall die in consequence of a duel or of the violation of law . . . . self-destruction of the person, whether voluntary or involuntary, sane or insane, at the time." Assured died from taking by mistake an overdose of laudanum. The court, per Bailey, P. J., said: "It is only where death results from an express design on the part of the deceased, or from some act which, though performed with no intention of producing death, is of itself culpably negligent, that the deceased can be charged with the responsibility of self-destruction. . . . . Voluntary self-destruction obviously can mean nothing more than the taking of one's life purposely and intentionally. Involuntary self-destruction would then include all those cases where a person, without intending to accomplish his own death, carelessly and negligently does acts which may naturally and probably result, and do in fact result, in death. To go beyond this and relieve the insurers from liability in all cases where the acts of the insured, without

void if the insured "dies by his own hand or act, voluntary or otherwise," is not avoided by his innocently taking a fatal

design or negligence on his part, do in fact contribute to shorten or terminate his life would, in most cases, render life policies of very little value to the insured." In Mutual L. Ins. Co. v. Lawrence (Ill. 1881), 8 Bradw. 488, it was held that instructions in this case limiting the effect of the condition to cases of gross negligence, and attempting to apply to this case the rules ordinarily applicable to that degree of negligence, were erroneous. Involuntary self-destruction is not "self-destruction": New Home L. Assn. v. Hagler (1888), 29 Ill. App. 437, 439, citing and quoting Life Ins. Co. v. Broughton, 109 U. S. 121; Connecticut Mut. L. Ins. Co. v. Smith (1890), 39 Ill. App. 569. The condition here was "self-destruction of the insured, whether voluntary or involuntary, and whether he be sane or insane at the time." In this case it was alleged that the insured died by an act of self-destruction by poisoning himself. The replication was that assured did not at the time "purposely or intentionally poison himself and therefrom die by an act of self-destruction in manner and form as in said third plea alleged," etc. A demurrer to this replication was overruled, and was held by the appellate court properly so. The court, per Conger, P. J., said: "It is perversion of language and an absurdity to say that one can destroy himself by accident and with no intention so to do, unless it should be the direct result of negligence on his part. If a person accidentally fall into the water and is drowned, or take poison supposing it to be a harmless and proper drink and thereby dies, no one would think of saying that such person had died by an act of self-destruction." So an instruction making an accidental act of deceased which resulted in his death a defense is erroneous: Gooding v. United States L. Ins. Co. (1892), 46 Ill. App. 307. "Accident, mistake, or disease" not included under the proviso "die by his own hand," etc.: Estabrook v. Union Mut. L. Ins. Co. (1866), 54 Me. 224-28, per Appleton, C. J. "All the authorities concur in the view that an unintentional and accidental taking of life is not within the meaning and intention of the clause," "shall die by his own hand or act": Knickerbocker L. Ins. Co. v. Peters (1875), 42 Md. 414, per Miller, J.; Blackstone v. Insurance Co. (1889), 74 Md. 592. "Dying by his own hand" does not cover self-killing through accident or mistake: Scheffer v. National L. Ins. Co. (1879), 25 Minn. 534, 537, per Gilfillan, C. J. See further Phillips v. Louisiana Eq. L. Ins. Co. (1874), 26 La. Ann. 404; 21 Am. Rep. 534; Scarth v. Security Mut. L. Ins. Co. (1888), 75 Iowa, 346, 349, per Rothrock, C. J.; 39 N. W. Rep. 658; Northwestern Mut. L. Ins. Co. v. Hazlett (1885), 105 Ind. 212; Michigan Mut. L. Ins. Co. v. Nangle (1891), 130 Ind. 79; 45 L. J. 175; 29 N. E. Rep. 393. See, also, Dean American Mut. L. Ins. Co. v. Allen (1862), 4 Allen (Mass.), 102; 1 Big. L. & Acc. Ins. Cas. 195; Cooper v. Massachusetts etc. Ins. Co. (1869), 102 Mass. 227; Pollock v. United States Acc. Assn. (1882), 12 Week. Not. Cas. (Pa.) 251; 26 Alb. L. J. 464, n.; 59 Am. Dec. 489. In Stormont v. Waterloo L. & C. Assur. Co.

overdose of medicine while sane,[132] and taking an overdose of laudanum, by accident or mistake, while intoxicated is not dying by one's own hand.[132a] Upon the question of accident in such cases the court in Penfold v. Universal Life Insurance Company[133] says: "A purely accidental act committed by a sane person without any idea of injuring himself cannot be regarded as an act of self-destruction within the meaning of such contract." In Mutual Benefit Life Insurance Company v. Daviess,[133a] it is declared by the court, per Pryor, J., that the shooting of himself by the insured while insane "must be regarded as the result of an accident, as much so as if the pistol had gone off unexpectedly to the insured and killed him." [134]

§ 2640. Doubt as to "Suicide" or Accidental or Unintentional Self-killing.—If there be a doubt, the evidence being conflicting and nearly evenly balanced, whether the death was caused by suicide or accident, the presumption is in favor of the accident.[135]

§ 2641. Suicide under Clause Benefiting Third Parties acquiring Interests Prior Thereto.—Insurance compa-

(1858), 1 Fost. & F. (N. H.) 22, Channell, B., charged the jury: "The question is now for you on the whole evidence whether he [assured] threw himself out of the window voluntarily or fell out of it involuntarily through confusion of the sense or giddiness."

[132] Penfold v. Universal L. Ins. Co. (1881), 85 N. Y. 317; 29 Am. Rep. 616.

[132a] Equitable L. Assur. Soc. v. Paterson (1870), 41 Ga. 338; 5 Am. Rep. 535, per McCay, J.

[133] (1881), 85 N. Y. 317; 39 Am. Rep. 660.

[133a] (1888), 87 Ky. 541, 553.

[134] See, also, Streeter v. Insurance Co. (1887), 65 Mich. 199, 202, per Champlin, J.

[135] Ingersoll v. Knights of Golden Rule (1891), 47 Fed. Rep. 272. The condition in this case was "suicide whether sane or insane." The court cites the rule laid down by Harlow, J., in Insurance Co. v. McConkey (1887), 127 U. S. 667, 8 Sup. Ct. Rep. 1360, as to presumption against suicide. See, also, Macdonald v. Refuge Assur. Co., Lim., 17 Sess. Cas. Scot. 4th series (1890), 955; Winspear v. Accident Ins. Co., Lim. (1880), L. R. 6 Q. B. D. 42; Reynolds v. Accidental Ins. Co. (1870), 22 L. T., N. S., 820. Where the evidence points equally or indifferently to accident or suicide, the theory of accident is adopted: Travelers' Ins. Co. v. Sheppard (1890), 85 Ga. 802, per Bleckley, C. J. See Richardson v. Travelers' Ins. Co. (1891), 46 Fed. Rep. 843.

nies in England have in many cases qualified the condition in their policies that the policy shall be void if the insured dies by his own hand, by inserting a clause that in case a beneficial interest has become vested in a third party for valuable and pecuniary consideration then the policy shall be valid to the extent of such person's interest, subject to notice having been given to the company of the transaction as specified.[135a] If a policy stipulates that the insurer shall not be liable, should assured "die by his or her own hands, ... except to the extent of any bona fide interest therein which at the time of such death shall be vested in any other person or persons for his, her, or their own benefit, for a sufficient pecuniary or other consideration," such provision applies as well to the insurer as to a third person, and where the insured commits suicide in a temporary fit of insanity while the policy is in the insurer's hands as collateral security for money advanced by said insurer on a mortgage on real security, the policy is valid to the extent of the amount of indebtedness due to them on the mortgage at the time of such death of the insured.[136] So where a policy similarly conditioned as in the last case was deposited by assured with the plaintiffs as collateral for a loan to secure a debt owing by his firm, and also for other advances, and the notice required under the policy stipulation was given assurer, it was held, the assured having committed suicide, that plaintiffs might recover out of the policy the amount of their debt due at assured's death, and even though assured's estate might be benefited to that extent, assurers were not entitled to payment, either ratably or primarily, out of other securities held by plaintiffs.[137] It has been contended that con-

[135a] White v. British Empire Mut. L. Assur. Co., (1868) L. R. 7 Eq. Cas. 394.

[136] White v. British Empire Mut. L. Assur. Co. (1868), L. R. 7 Eq. Cas. 394; 17 Week. Rep. 26; quoting from Solicitors & G. L. Assur. Co. v. Lamb, 1 H. & M. 716.

[137] City Bank v. Sovereign L. Assur. Co. (L. T., N. S., 1884), 50 L. R. 565, where the condition was: "A policy effected either separately or jointly or with other lives upon the life of any person who shall die by his own hands or act, whether such act be felonious or otherwise, or shall die by dueling or by the hands of justice, shall become void, and all moneys paid in respect thereof shall be forfeited to the company. But in case the beneficial interest in the policy has been vested

ditions of this kind are an encouragement to suicide, and were therefore void as against public policy; but this objection was not sustained in the cases where the point was raised, and such conditions were held to be valid.[138] The assignment in such cases is held to refer to an assignment by contract. Therefore, an assignee in bankruptcy, he being an assignee by operation of the law, is held not to be an assignee for a valuable consideration within the meaning of the provision.[139]

§ 2642. Suicide as Defense in Connection with Statute.—In a case in the federal courts[140] the policy was executed and delivered in a state under a statute providing against suicide, except upon proof that assured contemplated suicide,[141] and it was held that the claim that the legislature used the word "contemplated" to signify a state of mind in which the assured had considered or thought about the subject of suicide, without any well-defined purpose or intent, was not tenable, but that the statute should be construed to mean that thereafter it should be no defense that the insured committed suicide unless it should be proven to the satisfaction of the court or jury that the insured intended or had resolved to commit suicide when he made his application for the policy.[142]

in any other person, either originally or by such person having taken a legal or equitable assignment thereof or charge or lien thereon for a valuable and pecuniary consideration, the policy shall remain valid to the extent of the interest of such other party, provided that notice in writing of such assignment, charge, or lien shall have been delivered at the office of the company thirty days before the death of the party on whose life the insurance was effected."

[138] See Moore v. Noalsey (1854), 4 El. & B. 243, s. c. 24 L. J. Q. B. 40; 1 Jur., N. S., 468; 28 Eng. L. & Eq. 248.

[139] Jackson v. Forster (1859), 1 El. & E. 463.

[140] Ætna L. Ins. Co. v. Florida (1895), 16 U. S. C. C. A. 618, and n. 623; 69 Fed. Rep. 932.

[141] "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void": Rev. Stats. Mo. 1889, sec. 5855; Rev. Stats. Mo. 1879, sec. 5982.

[142] Ætna L. Ins. Co. v. Florida (1895) 16 U. S. C. C. A. 622, 623, per Thayer, C. J. See Theobald v. Lodge, 59 Mo. 87, Keller v. Insurance

Notwithstanding a statutory provision estopping the insurer, except on the ground of fraud, from contesting, after the receipt of three annual premiums, any claim arising by reason of errors, omissions, or misstatements in the application other than those as to age,[143] the insurer may nevertheless avail itself, by way of defense, of the suicide of insured under a proviso that the policy shall be void if insured dies by his own hand, whether sane or insane. The condition first noted, even though the policy is conditioned to be subject thereto, does not affect the latter one, but relates solely to defenses based on errors, omissions, or misstatements in the application.[144]

§ 2643. Suicide—Option Reserved to Pay Amount of Insurance or Refund Premiums.—A stipulation in a life policy is valid which provides that it shall be void if assured shall "die by his own hand," but that if at the time of taking his life he is insane, the company will pay the amount insured or refund the premiums actually received with interest, and which reserves to the insurer the option to pursue either course.[145] In Mutual Benefit Life Insurance Company v. Daviess[146] the condition was, "shall die by his own hands, or in consequence of a duel or by reason of intemperance," the policy should be void, "except that in case he shall die by his own hand while insane," the insurer should repay the premiums with interest. The defense was that insured took his own life with his own hand, by shooting himself, and that he was insane at the time. The court, per Pryor, J., said that "the question of criminal self-destruction is not involved

Co., 58 Mo. App. 557. This statute of Missouri applies to all life insurances except where otherwise provided by statute: Knights Templar etc. Indemnity Co. v. Berry (1892), 1 U. S. C. C. A. 561; 50 Fed. Rep. 511; affirming 46 Fed. Rep. 439; 4 U. S. App. 353. "Death by suicide or by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract": Lester, Rowell & Hill's Ga. Code 1882, sec. 2822.

[143] Rev. Stats. Ohio, sec. 3626.

[144] Starck v. Union etc. L. Ins. Co. (1890), 134 Pa. St. 45; 19 Am. St. Rep. 674; 19 Atl. Rep. 703.

[145] Salentine v. Mutual B. L. Ins. Co. (1885), 24 Fed. Rep. 159. See sec. 2532 herein.

[146] (1888), 87 Ky. 541; 9 S. W. Rep. 812.

in the controversy, as the contract by its very terms is made to apply to the insanity of the insured. The object in view in inserting such a clause in the policy may have been, and doubtless was, to avoid the effect of the decisions, confining the meaning of the language 'die by his own hand' to criminal self-destruction, or the word 'suicide' to the deliberate purpose of a sane man to take his own life." The conclusion of the court was, "that if the insured fired the fatal shot, and had sufficient mental power at the time to know that it would take his life, and fired the pistol with that intention, the recovery in this case is limited to the premiums paid with the interest; while on the other hand, if the firing of the pistol was not intentional, because of the unconsciousness on the part of the insured that such an act would take his life, the recovery must be had of the principal sum."

§ 2644. Stipulation as to Part Payment or Incontestability after Specified Time.—Where the law does not prohibit such a provision, it is held that the insurer may limit the payment on the policy in case of suicide to the legal reserve.[147] If the application contains a stipulation excepting the insurer from liability in case of the insured's death by his own hand, and this clause is not carried into the policy, but the latter does provide that claims under it "by death occurring two or more years after its date will be incontestable, except for fraud in obtaining the policy," the proper construction of the policy in connection with the application is that the policy does not cover death by suicide within two years from the date of its delivery, but that after two years it is incontestable for suicide.[148]

[147] Frey v. Germania L. Ins. Co. (1885), 56 Mich. 29.

[148] Goodwin v. Provident Sav. L. Assur. Co. (Iowa, 1896), 66 N. W. Rep. 156. An express contract for an increased premium to pay insurance money in case of suicide of the insured is declared in argument per Brickell, C. J., in Supreme Commandery K. of G. R. v. Ainsworth (1882), 71 Ala. 435, 447, to be void as offensive to law and good morals. But in Life Assn. of America v. Waller (1876), 57 Ga. 533, the stipulation was: "If the insured shall die by suicide during the continuance of this policy, said Life Association will pay to the legal holder of this policy its net present value at the date of such death."

§ 2645. Suicide—By-law as Part of Contract.—It would be a general rule that a by-law excepting liability in case of suicide of the insured would be of binding force upon him where under the terms of the certificate it is included as a part of the contract between the parties, and said certificate is issued upon the condition that insured shall comply with all the by-laws of the society, and especially would this be true where the member has in any manner had his attention particularly called to such excepting by-law.[149]

§ 2646. Taking His Own Life by Unlawful Act—By-law. If a by-law of a society provides that the policy shall be forfeited in case the insured member shall by any unlawful act, take his own life, no forfeiture of the policy can be based upon such exception from the fact that insured while trespassing on a train of cars was thrown under the wheels and killed.[150]

§ 2647. Adoption of By-law against Suicide after Contract Made.—Upon the assumption that suicide, self-destruction, or taking one's own life operates as a forfeiture of the right to recover under a life policy, even in the absence in the contract of an express exception that it shall so operate, an insurance association may, by a by-law enacted after the issuance of a certificate without an exception of suicide, stipulate

There was no question raised, however, as to the validity of such a clause. So policies nevertheless frequently stipulate against suicide only within a limited time, as is apparent from the following cases; no question as to the validity thereof was raised, however: Mutual L. Ins. Co. v. Walden (Ct. Civ. App. Tex. 1894), 26 S. W. Rep. 1012 (the condition in this case was a warranty not to "die by my own act within two years," etc.); Streeter v. Insurance Co. (1887), 65 Mich. 199 (the condition in this case provided against suicide, sane or insane, within three years). In Adkins v. Columbia L. Ins. Co. (1879), 70 Mo. 27, 35 Am. Rep. 410, the policy stipulated that in case of assured's death "by his own act or intention, whether sane or insane," etc., the company would pay the net value of the policy at the time of death. In Sabin v. National Union (1892), 90 Mich. 177, the condition was against suicide within two years. See sec. 2532 herein.

[149] Sabin v. Senate of National Union (1892), 90 Mich. 177; 51 N. W. Rep. 202.

[150] So held in Evans v. Phœnix Mut. R. Assn. (Chester Co. Pa. C. P. C. 1892), 9 Lane, 59; 49 Leg. Int. 15.

for forfeiture in case insured should while sane take his own life. Such subsequently enacted by-law, if the premise be true, does not impair or vary existing contracts, nor does it add any new term or condition to the contract. It relieves the association from no responsibility, nor does it impose any new or additional duty upon the member, and works no change in his relations. It is the mere declaration or expression of the implication of the law.[151] If the above premise be not true, then the rule expressed in a case in the appellate court in Illinois ought to govern, which is, that such subsequently enacted by-law excepting suicide from the risks assumed would not be binding upon the assured unless the power to pass such subsequent by-law is expressly reserved in the contract.[152] It will be observed from an examination of the condition given in the note below to the last case that the words "sane or insane, voluntary or involuntary," are included in the exception, and there is nothing in the opinion to show that the clause was not construed in its entirety, and the decision may, therefore, perhaps be distinguished from the case first noted under this section, where it is held that the addition, however, of the words "sane or insane" in such subsequent by-law as the one considered adds a new term to such a contract, but that under a power reserved in the contract to alter by-laws or add new ones the words "sane or insane" may be added.[153]

§ 2648. Suicide—Policy to be Void in Case of Death by Violation of Law.—Death by suicide will not avoid

[151] So held in Supreme Commandery K. of G. R. v. Ainsworth (1882), 71 Ala. 435, 447.

[152] Northwestern B. & Mut. Aid Assn. v. Warner (1887), 24 Ill. App. 357. The by-law in this case was: "Death executed by the hand, act, or procurement of the member, whether voluntary or involuntary, sane or insane, at the time, is a risk not assumed by the association."

[153] Supreme Commandery K. of G. R. v. Ainsworth (1882), 71 Ala. 435, 449. In this case the contract under the certificate when issued recited that any violation of the "requirements of the law now in force or hereafter enacted governing the order or this class shall render this certificate null and void." It also stipulated for a "full compliance with all the laws of the order now in force or that may hereafter be enacted," and was also "subject to the laws of the order now in force or which may hereafter be enacted by the supreme commandery."

a policy which provides that if the insured "die in violation of an attempt to violate any law," the policy shall be void.[154] Where a policy provided that "if the assured shall die in consequence of a violation of any criminal law of any country, state, or territory in which the assured may be this certificate shall be null and void," it was held that suicide committed by an alleged fugitive from justice to avoid arrest and trial for a crime committed by him is not to be considered as the proximate result of the alleged crime, and that his death by suicide is not, within the proper meaning of the policy, to be considered as the violation of law therein referred to.[155] If the attempt to commit suicide is made a criminal offense, such an attempt will, of course, avoid a policy containing such a condition, though if the attempt were successful, it would not avoid the policy.[156]

§ 2649. Suicide—Intentional Injuries by Assured or Another.—In Travelers' Insurance Company v. McConkey,[157] decided in 1888, the policy insured against bodily injuries "effected through external, violent, and accidental means; . . . . provided, always, that this insurance shall not extend . . . . to any death or disability . . . . caused wholly or in part, or jointly, by bodily infirmities or disease existing prior or subsequent to the date of this contract, ... and no claims shall be made under this policy when the death or injury may have been caused by . . . . suicide (felonious or otherwise, sane or insane) . . . . or intentional injuries inflicted by the insured or any other person." The complaint alleged an accidental shooting through the heart by another and consequent

[154] Darrow v. Family Fund Soc. (1889), 116 N. Y. 537; 15 Am. St. Rep. 430; 22 N. E. Rep. 1095; 6 L. R. Annot. 495; 27 N. Y. St. Rep. 474 (one judge dissenting). See Patrick v. Excelsior L. Ins. Co. (1875), 4 Hun (N. Y.), 263; Freeman v. National Ben. Soc. (1886), 42 Hun (N. Y.), 252.

[155] Kerr v. Minnesota Mut. Ben. Assn. (1888), 39 Minn. 174; 39 N. W. Rep. 312.

[156] Meacham v. New York S. Mut. Ben. Assn. (1890), 120 N. Y. 237; 30 N. Y. St. Rep. 874; 24 N. E. Rep. 283; citing Darrow v. Family Fund Soc. (1889), 116 N. Y. 537; 15 Am. St. Rep. 430; 22 N. E. Rep. 1095; 6 L. R. Annot. 495; 27 N. Y. St. Rep. 474, and note.

[157] 127 U. S. 661.

death; the defense was suicide, and intentional injuries inflicted by assured or some other person, and it was held that no claim could be sustained if the injuries which caused insured's death were inflicted intentionally upon himself or when insane, or if inflicted upon him by another person.

§ 2650. Suicide in Absence of Stipulation—Contra.—There seems to be some conflict of opinion as to the effect of suicide where there is no stipulation against it in the policy. In New York the suicide of one whose life is insured constitutes no defense to an action on the policy unless it comes within some condition of the contract of insurance relieving the insurer from liability in such a case.[158] But the rule is subject, as will be noted hereafter, to such exception as arises in cases where at the time of making the application the assured intended to commit suicide, and the intent evidences a legal fraud. As opposed to the New York decision, the court, per Brickell, J., in an Alabama case[159] decided in 1882, declares that voluntary self-destruction or suicide by a sane insured should be implied as an exception of liability, or rather as not within the risks contemplated, even though not expressly excepted in the policy. There is certainly much force in the argument of the court in this last case, but inasmuch as the insurers frame their policies, and may include such valid exceptions as may be agreed upon, it would seem that the courts should be loath to import an exception against liability into the policy which the insurers have neglected to express, but if the failure to expressly except suicide in the policy amounts to an implied agreement to pay the amount of the policy in case the insured while sane commits suicide, then such implied agreement can stand on no better footing than an express agreement to the same effect, and it ought to be held void upon principle and as against pub-

[158] Darrow v. Family etc. Soc., 116 N. Y. 537; 15 Am. St. Rep. 430. See Borradaile v. Hunter, 5 Man. & G. 658, per Lord Erskine; citing Amicable L. Assur. Co. v. Bolland, Selw. N. P., 10th ed., 1033; 4 Bligh, N. S., 194, 2 Dow & C. 1.

[159] Supreme Commandery K. of G. R. v. Ainsworth (1882), 71 Ala. 436, 445-47; 46 Am. Rep. 335, 337.

lic policy. And if the act of suicide were voluntarily committed by a sane person under such circumstances as clearly evidence a fraud, the fraud itself ought to be a defense.[160]

§ 2651. Suicide by Insane Person in Absence of Stipulation against Suicide.—Going beyond the point of voluntary suicide by a sane person it would be clear that, in the absence of an exception of suicide from the risks, the self-destruction of assured while insane could not avoid the policy,[161] and it is declared that an act in a state of unconsciousness, whether assured be sane or insane, would be merely accidental, and not avoid the policy.[162]

§ 2652. Suicide where Policy Obtained with that Intent—Fraud—Creditor.—If the policy is obtained by assured with the intent to take his own life and appropriate the money to the payment of creditors and the support of his family and relations, it is void, even though it contains no condition as to the manner of death, and a creditor who is substituted as a beneficiary stands in no better position than the assured himself, so far as the binding force of the policy is concerned. The ground of defense in such a case is not the suicide, but the legal fraud, suicide being the ultimate agency by which the fraud is accomplished.[163]

[160] "If the policy contains no condition against self-destruction, it is clear upon principle that a voluntary suicide, the assured being sane at the time, is a fraud upon the insurer and vitiates the insurance": Note 59 Am. Dec. 487. A charge to the jury is right which instructs that if no condition against suicide exists in the policy, the act of suicide by the assured is a fraud upon the assurer preventing recovery: Hartman v. Keystone Ins. Co. (1853), 21 Pa. St. 466. A covenant "to do and perform all such acts, matters, and things as should be requisite for continuing and keeping on foot a policy" cannot be read negatively, and is not broken by the suicide of the covenantor whereby the policy is forfeited: Dormay v. Borrodaile (1847), 10 Beav. 335.

[161] Horn v. Anglo-Australian etc. Ins. Co. (1861), 30 L. J. Ch. 511; 7 Jur., N. S., 673; 2 Big. L. & Acc. Ins. Cas. 602.

[162] Streeter v. Insurance Soc. (1887), 65 Mich. 199, 202, per Champlin, J.

[163] Smith v. National B. Soc. (1890), 123 N. Y. 85; 33 N. Y. St. Rep. 67; affirming 51 Hun (N. Y.), 575. See, also, Smith v. Massachusetts M. L. Ins. Co. (1875), 63 N. Y. 186.

§ 2653. Suicide for Benefit of Assured's Estate or Third Person.—Even though there is no condition against suicide, the deliberate killing of himself by insured while sane, and with intent to secure the amount of the insurance to his estate, avoids the policy.[164] So if a life policy is taken out by insured not for his own benefit, but for the benefit of a third person, as in case where it is payable to the heirs or widow, and there is no stipulation that it shall be void in case of suicide or self-destruction of assured, then, as a general rule, suicide is no defense, for ordinarily the beneficiary is not bound by acts or declarations of the assured done or made by him after the issue of the policy, unless the same are in violation of some condition in the policy.[165]

[164] Ritter v. Mutual L. Ins. Co. (1895), 17 U. S. C. C. A. 537; 70 Fed. Rep. 954; 69 Fed. Rep. 505. In this case insured left a letter to his executor describing his liabilities and his insurance, and directed the application of the proceeds of his policy to his debts. Other letters were also written by assured evidencing a deliberate suicide, although it was not shown by the declarations of assured or by other like positive evidence that he intended to take his own life. He was heavily in debt and insolvent, had unlawfully appropriated trust funds, had engaged in hazardous stock speculations, and was carrying an unusually large amount of insurance grossly disproportionate to that which his income justified. He took out additional insurance and again increased the same by about ninety thousand dollars, and shortly thereafter committed suicide. The court cites Moore v. Woolsey, 4 El. & B. 243, 254, per Lord Campbell; Hartman v. Insurance Co., 21 Pa. St. 466, 479; Supreme Commandery v. Ainsworth, 71 Ala. 436, 447; Insurance Co. v. Armstrong, 117 U. S. 591, 600; 6 Sup. Ct. Rep. 877, per Field, J.

[165] Fitch v. American P. L. Ins. Co. (1875), 59 N. Y. 557; 11 Alb. L. J. 91; followed in Patrick v. Excelsior L. Ins. Co., 4 Hun (N. Y.), 263; 67 Barb. (N. Y. 1875), 202; Mills v. Rebstock (1882), 29 Minn. 380; 13 N. W. Rep. 162. In this case the constitution and by-laws of a mutual benefit association were held to stand in place of a policy, no policy being issued. The society was organized to secure to the heirs of deceased members the benefits of life insurance on the assessment plan. There was no provision qualifying the right of recovery in case of suicide. It was required, however, that the member be in "good standing" at the time of his death. "Good standing" was evidently dependent on the payment of dues as required under the contract: Kerr v. Minnesota Mut. B. Cas. (1888), 39 Minn. 174; 12 Am. St. Rep. 631; 39 N. W. Rep. 312, where it is said, per Vandeburgh, J.: "In the law of insurance suicide is not as a rule recognized as a ground of

§ **2654. Suicide—Temporary Insanity.**—In the absence of the clause "sane or insane," if the insured commits suicide in a temporary fit of insanity the policy is not invalidated.[166]

§ **2655. Suicide—Temporary Insanity, "Sane or Insane, Voluntary or Involuntary."**—If one commits suicide while temporarily insane, and the policy stipulates against self-destruction, sane or insane, voluntary or involuntary, there can be no recovery.[167]

§ **2656. Suicide—Temporary Insanity, "Felonious or Otherwise, Sane or Insane."**—In Iowa it is held that a condition that "suicide, felonious or otherwise, sane or insane," prevents a recovery where the act of suicide was committed by insured while temporarily insane from illness, and when he was neither conscious nor responsible.[168]

§ **2657. Suicide—"Self-destruction," "in Any Form"—"Disease"—"Voluntary Act of Assured."**—The word "self-destruction" is synonymous with the word "suicide" where the insurer is exempted from liability in case of "suicide—the self-destruction of the insured in any form except upon proof that the same is the direct result of disease or accident, occurring without the voluntary act of the insured"; and the words "in any form" in the same clause relate only to the manner of killing; the word "disease" used in the same clause, unrestricted by anything in the context, includes disease of the mind as well as disease of the body, and the concluding words,

exemption from liability or for forfeiture of a policy issued for the benefit of a third person, unless it is expressly so in the policy."

[166] Horn v. Anglo-Australian etc. Co. (1861), 7 Jur., N. S., 673.

[167] Dennis v. Union Mut. L. Ins. Co. (1890), 84 Cal. 571 (points involved were those of pleading and proof merely).

[168] Scarth v. Security Mut. L. Soc. (1888), 75 Iowa, 346; 39 N. W. Rep. 660. The court, per Rothrock, J., says: "We think, however, that the better rule and the logical conclusion is that the condition in the policy was intended to include self-destruction, no matter what the mental condition of the insured was at the time of the act. . . . . It means all suicidal acts, whether such as are denominated as criminal or such as are the offspring of insanity."

"voluntary act of the assured," point to the act of a person mentally capable of controlling his will.[169]

§ 2658. Stipulation as to "Suicide"—Death "by His Own Hand," and the Like.—Provisions that "the policy shall be void in case the insured shall "commit suicide," or "die by his own hand," or "by his own act," or "by his own act or intention," or "take his own life," are by settled authority agreed to have the same meaning, there being no substantial difference between the terms.[170] The effect of such conditions has been much discussed by the courts, and while it is generally agreed that suicide by a sane person avoids the policy, yet beyond that point there has been some difference of opinion, a few courts not adopting the rule declared by the supreme court of the United States, but holding to the English rule. The decisions in and opinions of the several courts are, however, for want of space fully considered in the note at the end of this chapter, and while the words "sane or insane" as a part of the proviso, have necessarily avoided successfully raising the question involved in their absence, yet the probability of the point again occurring under policies without these or other like exclusive words justifies the consideration exhaustively of the question and so settling it, at least so far as the weight of authority is concerned.

§ 2659. "Suicide" and Like Clauses—Rule in United States Supreme Court.—The established rule in the supreme court of the United States is, that if one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he understands its physical nature, consequences, and effect, it is not "suicide," or "self-destruction," or "dying by his own hand," within the meaning of those words or words of like character and con-

[169] Connecticut L. Ins. Co. v. Akens (1893), 150 U. S. 468, 474, 475, per Gray, J.

[170] Cooper v. Massachusetts Ins. Co. (1869), 102 Mass. 227; Mutual L. Ins. Co. v. Wiswell (Kan. 1896), 44 Pac. Rep. 997; Breasted v. Farmers' L. & T. Co. (1843), 4 Hill (N. Y.), 73; 8 N. Y. (4 Seld.) 299;

struction excepting such risks out of the policy, there being no other words expressly extending the exemption to such a case.[171]

§ **2660. English Rule.**—Under the English rule the responsibility of assured as a moral agent, and his inability to judge between the right and wrong or moral character and consequences of his act, is an immaterial factor, and if the insured knew at the time of committing the act of self-destruction or suicide that his life would be destroyed, and so intended, the policy is avoided thereby.[172]

§ **2661. Rule in This Country.**—It is conclusively evident from the decisions and opinions considered in the note below that the rule declared in the United States supreme court is that sustained by the almost overwhelming weight of authority in this country, and is the true rule. It further accords with the rules of construction in insurance law, and with that reason and justice which should ever prevail.[173]

59 Am. Dec. 482; Adkins v. Columbia L. Ins. Co. (1879), 70 Mo. 27; 35 Am. Rep. 410; Clift v. Schwabe (1846), 3 Man. G. & S. (3 C. B.) 437. See note 173, "English Rule," herein.

[171] Connecticut L. Ins. Co. v. Akens (1893), 150 U. S. 468, 473, per Gray, J. The condition in this case was: "Suicide.—The self-destruction of the insured in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured." The assured died by taking poison. The court, per Gray, also said: "The clause contains no such significant and decisive words as 'die by suicide, sane or insane,' as in Bigelow v. Berkshire Ins. Co., 93 U. S. 284; or 'by suicide, felonious or otherwise, sane or insane,' as in Travelers' Ins. Co. v. McConkey, 127 U. S. 661." See note at end of this chapter.

[172] See note at end of this chapter.

[173] *Rule and Cases in United States Courts.*—The case of Connecticut L. Ins. Co. v. Akens, 150 U. S. 468, establishing the rule given in the text as that of the United States courts was decided in 1893, but the court cites and follows several other decisions. Thus in one case decided in 1887 (Insurance Co. v. Crandall, 120 U. S. 527; 7 Supr. Ct. Rep. 685; 27 Fed. Rep. 40), the policy was against "bodily injuries effected through external accidental means," with an exception of liability in case of death or disability "caused wholly or in part by bodily infirmities or disease . . . . or by suicide . . . . or self-inflicted injuries." The insured died by hanging himself while insane, and this was held not within the exception, but that the death was

covered by the policy, Gray, J., saying: "The decisions upon the effect of a policy of life insurance which provides that it shall be void if the assured "shall die by suicide" or "shall die by his own hand" go far toward determining this question. This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words "sane or insane," does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect": Id. 531. In another case cited in the decision first noted in the text, decided in 1884 (Connecticut Ins. Co. v. Lathrop, 111 U. S. 612) the condition was, "die by his own hand." It was claimed that assured died by his own hand because, with premeditation and deliberation, he shot himself through the head and died in consequence. The points in this case were as to the right of the court to withdraw the case from the jury and the admissibility of certain evidence as to insanity or the admissibility of the opinion of a nonprofessional witness as to sanity or insanity. The opinion is by Harlan, J. The court in the 1893 decision also cites the noted case of Insurance Co. v. Terry, 15 Wall. (U. S.) 580, decided in 1872. The contract here was between Mrs. Terry and the insurer, the insured, Mr. Terry, not being a party to the contract, but the court said this "made no difference. The condition was: "If the said person whose life is hereby insured . . . . shall die by his own hand . . . . this policy shall be null and void." The court, Hunt, J., also declares that "the question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will, then, made by him would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offense, upon all the authorities he would have been entitled to a charge that upon proof of the facts assumed the jury must acquit him. We think a similar principle must control the present case, although the standard may be different": Id. 590, citing upon this point Freeman v. People, 4 Denio (N. Y.), 9; Willis v. People, 32 N. Y. 719; Seamen's Soc. v. Hopper, 33 N. Y. 619; The Marquis of Winchester's case, 6 Reports, 23; Combe's case, Moore, 759. Continuing, the court also says: "We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not

the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable": Id. 590, 591. In Insurance Co. v. Rodel, 95 U. S. 232 (the condition in this case was "die by his own hand"), decided in 1877 and cited in the case first above noted, the charge of the court was in the very words sanctioned and approved in the Terry case (Insurance Co. v. Terry, 15 Wall. (U. S.) 580), and the instruction was held not erroneous, the court, per Bradley, J., saying: "We see no reason to modify the views expressed by us on that occasion." "Another case cited and relied on as establishing the rule was decided in 1883: Manhattan Ins. Co. v. Broughton, 109 U. S. 121. The stipulation therein was in case assured "shall die by suicide or by the hands of justice or in consequence of a duel or of a violation of a law of these states or of the United States" or of any other country which he might under the policy be permitted to visit or reside in, then the policy should be void. The experts for plaintiff testified that assured was suffering from that kind of unsoundness of mind called melancholia, and there was clearly some evidence of insanity for the jury. The instructions were in exact accordance with the rule in the Terry case (Insurance Co. v. Terry (1872), 15 Wall. (U. S.) 580), and the court, per Gray, J., said: "Upon consideration, we are unanimously of opinion that the rule so established is sounder in principle, as well as simpler in application, than that which makes the effect of the act of self-destruction upon the interest of those for whose benefit the policy was made to depend upon the very subtle and difficult question how far any exercise of the will can be attributed to a man who is so unsound of mind that while he foresees the physical consequences which will directly result from his act, he cannot understand its moral nature and character, or in any just sense be said to know what he is doing." The rule declared by the supreme court differs, however, from that stated in certain decisions in the circuit courts. In Gay v. Union Mut. L. Ins. Co., 9 Blatchf. (C. C.) 142, 10 Fed. Cas. 115, case No. 5282, decided 1871, the provision was "die by suicide." The insured killed himself by firing a pistol at his head, and the point whether he was capable of understanding the moral aspects of the act or of distinguishing between right and wrong was held immaterial if insured was conscious of the act he was committing and intended to take his own life, but that if he was not thus conscious, but was impelled by insane delusion overpowering his understanding and will, or was impelled by an uncontrollable impulse, which neither his understanding or will could resist, the insurers were liable. In Nimick v. Mutual L. Ins. Co., 3 Brewst. (Pa.) 502, 10 Am. L. Reg. (N. S.) 101, 18 Fed. Cas. 247, case No. 10266, decided 1871, the condition was "die by his own hand." It was held that the moral responsibility does not affect the nature of the hazard, and that the causa causans affecting assured's will in committing suicide was immaterial. The court adopts the language of Erskine, J., in Borradaile v. Hunter, 5 Man. & G. 639, to the effect that the moral nature and quality of the act is not relevant, and also the words of Bigelow, C. J., in Dean v. American Mut. L. Ins. Co., 4 Allen (Mass.), 98. And necessarily these circuit court de-

cisions must be deemed overruled. Again, as to what constitutes that degree of mental unsoundness which will relieve against what otherwise would be the consequence of self-destruction, the court in a case in the United States circuit court of appeals approved the following charge to the jury: "If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, such self-destruction will not of itself prevent recovery upon the policies. This is affirmed. I will say, however, that we must understand what is meant and intended by the term 'moral character of his act.' It is a term which has been used by the courts, and is correctly inserted in the point; but it is a term which might be misunderstood. We are not to enter into the domain of metaphysics in determining what constitutes insanity. If Mr. Runk understood what he was doing and the consequences of his act or acts to himself as well as to others—in other words, if he understood as a man of sound mind would the consequences to follow from his contemplated suicide to himself, his character, his family, and others, and was able to comprehend the wrongfulness of what he was about to do as a sane man would—then he is to be regarded by you as sane; otherwise he is not." And Acheson, circuit judge, says: "Upon the question of insanity, the jury was plainly informed that to prevent a recovery it was not enough that Mr. Runk understood the physical nature, consequence, and effect of his act of self-destruction, but that he must also have understood the moral character and consequence of the act, and that if he did not comprehend its wrongfulness he was to be regarded by the jury as insane. We do not perceive that in the instructions complained of there was any departure from the principles approved by the supreme court": Ritter v. Mutual L. Ins. Co. (1895), 17 U. S. C. C. A. 537; 70 Fed. Rep. 954; affirming 69 Fed. Rep. 505; citing Insurance Co. v. Terry (1872), 15 Wall. (U. S.) 580; Insurance Co. v. Rodel (1877), 95 U. S. 232; Insurance Co. v. Broughton (1883), 109 U. S. 121; 3 Sup. Ct. Rep. 99; Insurance Co. v. Akens (1893), 150 U. S. 468; 14 Sup. Ct. Rep. 155; for other federal cases see Waters v. Connecticut Mut. L. Ins. Co., 2 Fed. Rep. 892; 9 Ins. L. J. 837; Moore v. Connecticut Mut. L. Ins. Co., 3 Fed. Rep. 144; 4 Big. L. & Acc. Ins. Cas. 138; Hiatt v. Mutual L. Ins. Co., 2 Dill (C. C.) 572.

English Rule and Cases.—In Clift v. Schwabe (1846) 3 Com. B. 436–8, it was stipulated that "every policy effected by a person on his or her own life should be void if such person should commit suicide or die by dueling or the hands of justice." The insured, who had effected a policy on his own life, died from voluntarily, and for the purpose of killing himself, taking poison, but the circumstances showed that at the time he was of unsound mind. The defense of suicide was relied on, and the trial judge directed the jury, "that in order to find the issue for the defendants, it was necessary that they, the jury, should be satisfied that A died by his own voluntary act, being then able to distinguish between right and wrong and to appreciate the nature and quality of the act that he was doing so as to be a responsible

moral agent; that the burden of proof as to his dying by his own voluntary act was on the defendants; but that being established, the jury must assume that he was of sane mind and a responsible moral agent, unless the contrary should appear in evidence." And it was held, two judges dissenting, that the instruction was erroneous, since all acts of voluntary self-destruction were included under the stipulation, and that the insured having voluntarily committed suicide, the fact whether he was or not at the time a responsible moral agent was immaterial. In Borradaile v. Hunter (decided 1843), 5 Man. & G. 639, the stipulation was, that if "the assured should die by his own hands or by the hands of justice or in consequence of a duel" the policy should be void. The assured threw himself into the Thames from Vauxhall bridge and was drowned. The issue was raised whether the assured died by his own hands, and the jury found that he "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his own life and intending thereby so to do; but that at the time of committing the act he was not capable of judging between right and wrong." It was decided that the stipulation or proviso was not limited by the accompanying provisos to acts of felonious suicide, but included all acts of voluntary self-destruction, and the policy was avoided. Tindal, C. J., dissented, however. In Stormont v. Waterloo L. & C. Assur. Co. 1858), 1 Fost. & F. 22, 23, Channell, B., concluded a charge to the jury as follows: "The defendants plead that it was a voluntary act" (the assured having been found falling out of a window). "Did he know that he was throwing himself out?"

Rule in Alabama.—"There is a contrariety of decision as to the effect of the exception, "against suicide or self-destruction," whether it embraces any and every act of intentional self-destruction or only suicide, criminal self-destruction. The preponderance of authority points to the conclusion that it refers solely to suicide": Supreme Commandery K. of G. R. v. Ainsworth (1882), 71 Ala. 435, 449, per Brickell, C. J.; citing Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580; Phadenhauer v. Germania L. Ins. Co., 7 Heisk. (Tenn.) 567; 19 Am. Rep. 623; De Gorgorza v. Knickerbocker L. Ins. Co., 65 N. Y. 232; Bliss on Life Insurance, secs. 225-38. The condition in the principal case was for forfeiture if the member should take his own life, whether sane or insane. *Rule in Georgia.*—In this state the policy is void if insured dies by his own hand, except where it is clearly shown that at the time the act was done the mental condition of assured was such as to render him incapable of distinguishing right from wrong to such an extent as to render him legally and morally responsible for his acts and conduct, but the fact that insured committed suicide is not of itself evidence of insanity: Merritt v. Cotton States L. Ins. Co. (1875), 55 Ga. 103. The condition was, "die by his own hand." The above rule is that stated by Warner, C. J. In a case decided in 1876, in this state—Life Assn of America v. Waller, 57 Ga. 533 (the condition here was, "shall die by suicide")—the court, per Bleekley, J., defines suicide as "something more than self-sought and self-inflicted death. It is a species of crime or wickedness—something

wrong; a kind of self-murder. . . . . In suicide there must be a moral element, and the presence of that depends upon whether the man is so far rational as to be able to discern the difference between right and wrong. If, from disease or misfortune, he is so utterly irrational as to be equally innocent with or without attempting the forbidden violence, he is not a moral agent, and his act is that of a mere animal which has lost the instinct of self-preservation. . . . . We are aware that there is a strong current of modern decision, both English and American, against applying any moral test whatever to cases of alleged suicide in the law of life insurance, but we believe that the true doctrine was announced by the supreme court of the United States in Life Ins. Co. v. Terry," 15 Wall. (U. S.) 580. *Rule in Illinois.*—In a case in the Illinois appellate court decided in 1888—New Home Life Ins. Co. v. Hagler, 29 Ill. App. 437 (the condition in this case was, "shall die by reason of any act of self-destruction whatever")—the court adopted the ruling in Insurance Co. v. Terry, 15 Wall. (U. S.) 580, in the United States supreme court, and held that an intent to commit suicide and knowledge that the act would so result is not sufficient, where the insured is impelled by an irresistible impulse or is unable to understand the moral nature of the act. In Suppiger v. Covenant Mut. Ben. Assn. (Ill. 1886), 20 Bradw. 595, the condition was, "die by reason of any act of self-destruction, whether at the time of committing the same he be sane or insane, whether felonious or otherwise," and the court, per Wilkin, P. J., says: "The irreconcilable conflict of authorities is on the question as to whether the unconsciousness must extend to the moral right or wrong of the act, thus bringing the subject within the legal definition of suicide or whether any voluntary self-killing is sufficient to discharge the insurer. The supreme court of the United States is committed to the former doctrine and holds that there must be an act of criminal self-destruction: Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121; 3 Supr. Ct. Rep. 99; Bigelow v. Berkshire L. Ins. Co., 93 U. S. 284. The courts of last resort in many of the states adopt the same rule, while in others and in England it is held that a voluntary self-destruction is within the terms of the condition, although at the time of the act there was not sufficient mental understanding to appreciate its moral turpitude: Borradaile v. Hunter, 5 Man. & G. 693; Clift v. Schwabe, 3 Com. B. (3 Man. G. & S.) 437." The decision, however, turned upon the degree of insanity and insane irresistible impulse. In Northwestern Ben. & Mut. Aid Assn. v. Bloom (1886), 21 Ill. App. 159, the condition was, "If death shall result from suicide . . . . this agreement shall be null and void." The decision was, that the allegations, "did then and there immorally, wrongfully and wickedly," and did "wrongfully, wickedly, and fraudulently, and of his own volition commit suicide," amounted substantially to an allegation that insured committed suicide when sane and in his right mind, and was such a violation of the contract as to avoid it. *Rule in Indiana.*—In Indiana a condition avoiding the policy if assured shall die by his own hand does not apply where assured kills himself while of

unsound mind, where disease has so impaired his mind that although he may have sufficient mental capacity to know the physical consequences of his act, yet he is unable to comprehend its moral character: Michigan Mut. L. Ins. Co. v. Nangle (1891), 130 Ind. 79; 29 N. E. Rep. 393; 45 Alb. L. J. 175, per McBride, J. *Rule in Iowa.*—In Iowa, in a case decided in 1888, the court, per Rothrock, J., declares that "It has been held quite generally by the courts of this country that this general condition [suicide or die by his own hand without more] referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life": Scarth v. Security Mut. L. Soc., 75 Iowa, 346, 347; 39 N. W. Rep. 658. The condition in this case, however, was "suicide, felonious or otherwise, sane or insane." *Rule in Kentucky.*—A case arose in this state in 1869, (St. Louis Mut. L. Ins. Co. v. Graves, 6 Bush (Ky.), 268), wherein the condition was, if assured "shall die by his own hands, by delirium tremens, or the use of opium, or in consequence of a duel or the laws of any nation, state, or province," the policy shall be void. The assured shot himself, causing his death. The court, per Robertson, J., said: "All these terms alike, being ejusdem generis, imply a death as the natural consequence of some voluntary act of the assured which he had the moral power to avoid"; that is, that death by any of the enumerated means had reference alone to a voluntary act of assured which he had the moral power to avoid. That the inevitable act of an insane man who is in that respect morally dead is not within the proviso his voluntary act. Mental insanity is a disease, and the policy insures death by disease of any sort which ordinary prudence could not avoid. Death by insanity is death by disease and is so considered in medical jurisprudence. . . . . Death 'by his own hand' means suicide, not accidental or coerced, but premeditated by a sound mind and perpetrated by a free will, and a voluntary act of the will necessarily implies liberty and self-control, and consequently the act of an insane mind or subjugated will is not voluntary. . . . . The condition as to death 'by his own hand' reasonably imports, therefore, that if the insured should commit suicide voluntarily, when he had the moral power to forbear, just as he might commit it by the habitual use of opium or intoxicating liquor, should be thereby avoided. The death in each case alike must be the voluntary act of a sane mind and a responsible will. . . . . There is some apparent conflict . . . . on the construction of just such a condition of avoidance in a life policy as that which we are considering; but there is no very essential diversity in principle; all that is judicial, with perhaps one exception concurring in the principle that to avoid the policy the death must be 'voluntary,' and no mind itself rational can contemplate any act as voluntary unless it be the offspring of a free volition unconstrained by inevitable duress, physical or moral." The opinion in Dean v. American Ins. Co., 4 Allen (Mass.), is criticised as "elaborate, self-contradictory, and inconclusive." *Rule in Louisiana.*—In Louisiana (Phillips v. Louisiana Eq. L. Ins. Co. (1874), 26 La. Ann. 404; 21 Am. Rep. 534) it is held that the words "die by his own hands" should not be literally interpreted, but that the intention of the contracting parties should be

looked to to explain the latent ambiguity, and the common intent would apply only to the voluntary self-destruction, by whatever means accomplished; that self-destruction when insane is not within the exception, and the test of responsibility in civil, as well as in criminal cases is the state of the actor's reason or mental faculties. *Rule in Maine.*—The rule established in Maine in 1866, as declared by Appleton, C. J., is that the condition, "die by his own hand or in consequence of a duel or the violation of any state, national, or provincial law or by the hands of justice," does not cover the act of suicide while insane, but the clauses should all be construed together, and referred to a "felonious death, to the case of felo de se, not to the case of death without legal or moral blame—the result of accidental mistake or disease." *Rule in Maryland.*—In Maryland (Knickerbocker L. Ins. Co. v. Peters, (1875), 42 Md. 414) the proviso "die by his own hand or act," does not include within its meaning a self-killing in a fit of insanity which overpowered assured's consciousness, reason, and will, so that he is impelled by an insane impulse which he cannot resist. The court in this case, however, refused to express an opinion upon the points of the moral character of the act or the inability to distinguish between right and wrong as a point not involved in the case before it. *Rule in Massachusetts.*—In a case decided in this state in 1862, under the proviso "die by his own hand," it is held that suicide, even though committed while insane, avoids the policy where the act is understood and assured intended to take his own life: Dean v. American M. Ins. Co., 4 Allen (Mass.), 96. In a case decided in 1869 (Cooper v. Massachusetts Ins. Co., 102 Mass. 227; 3 Am. Rep. 451, n. 454), under the proviso, "die by suicide," it is held that there could be no recovery, although the act of self-destruction was committed under the influence of insanity, in the absence of evidence proving delirium or madness, or that the act was involuntary. *Rule in Michigan.*—In a Michigan case decided in 1889—Blackstone v. Insurance Co., 74 Mich. 592, 605, et seq. (the condition here was, "suicide . . . . or intentional injuries inflicted by or through the connivance of insured")—the court, per Long, J., approves as reasonable the rule declared by Hunt, J., in Insurance Co. v. Terry, 15 Wall. (U. S.) 580, and says: "The effect of this doctrine is, that in order to work a forfeiture under such a policy on the ground of self-destruction the insured must have had sufficient mental capacity, not only to understand that the act will destroy his life, but also to distinguish its moral quality and consequences—the right and wrong of it—and must perform the act, not under any uncontrolled impulse resulting from insanity, but voluntarily with the intent to end his life; in other words, that it must be an act done with an evil motive. We think that this doctrine is supported by the great preponderance of authority in this country, and must be conceded to be the prevailing American doctrine, and it seems to us to be the safer and more reasonable and consistent doctrine. It agrees with the general rule as to the excusatory feature of insanity in civil as well as in criminal cases. It also operates to prevent forfeiture which is a favorite principle of an enlightened jurisprudence." In

another case in this state, decided in 1887 (Streeter v. Insurance Soc., 65 Mich. 199, 202), it is declared by Champlin, J., that "if a person does an act in a state of unconsciousness, whether he be sane or insane, such act is nothing more or less than accidental, and would not operate to forfeit the policy." Again, under another decision, given in 1876 (John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. (12 Post) 41), the condition was, "shall die by his own hand," and it was declared by the court, per Campbell, J., that the term "suicide" has no such restricted meaning as a wrongful act or self-murder. "It means self-killing just as 'homicide' means killing anyone else. . . . . Suicide was only cognizable at law when the person was felo de se or guilty of a felonious act. If non compos mentis, the actor in homicide or suicide commits no crime. In one sense, a man dies by his own hands who kills himself, whether sound or frenzied. But the condition in this policy cannot be construed to cause a forfeiture for acts involving no evil will." The court also held that the clause, being with others which involved voluntary wrongdoing, such as death by dueling, or by the hands of justice, etc., it was "fairly to be inferred that it is regarded as ejusdem generis and depending on the same reasons"; that "death by his own hands in the case of one non compos is as much the result of disease as death by fever or consumption. The act of an insane man is morally no more his act than if it were mechanical." *Rule in Minnesota.*—In Minnesota (Scheffer v. National L. Ins. Co. (1879), 25 Minn. 534) the proviso was, "dying by his own hand," and a charge was upheld that "if his [Scheffer's] reason was so far overthrown that he had not the power or capacity to exercise it upon the act he was about to commit; if he did not understand and appreciate the effect of the act, but was driven to it by an uncontrollable impulse caused by insanity, then it is not to be considered as the act of his own hand within the meaning of the policy." *Missouri Case.*—A case in Missouri (Adkins v. Columbia Life Ins. Co. (1879), 70 Mo. 27; 35 Am. Rep. 410) has been cited as establishing a rule on the point under consideration. But the condition here was against death of insured "by his own act or intention, whether sane or insane," and necessarily the words, "sane or insane," controlled the decision, but the opinion of the court, per Hough, J., notes the conflict of opinion in cases of suicide or under provisos, "die by his own hand," etc., speaks of such conflict as irreconcilable, and adopts the words of Rapallo, J., in the Van Zandt case (Van Zandt v. Mutual Ben. L. Ins. Co. (1873), 55 N. Y. 169, criticising the language of Hunt, J., in the Terry case (Insurance Co. v. Terry, 15 Wall. (U. S.) 580) for "a want of perspicuity" and inconsistent with itself. Upon the whole, however, the opinion in this Missouri case can hardly be said to indicate in any way what the rule is in that state under the words "die by his own hand," or some like expression used alone. *Rule in New York.*—In 1881, in a case where the condition was, "die by his own hand or act voluntary or otherwise" (Penfold v. Universal L. Ins. Co., 85 N. Y. 317; 39 Am. Rep. 660), a charge was upheld that the jury must find that the overdose of medicine taken by assured was taken

for the purpose of destroying his life voluntarily, knowingly, and intentionally. In 1879, under the proviso, "die by his own hand" (Newton v. Mutual Ben. L. Ins. Co., 76 N. Y. 426; 32 Am. Rep. 335), the court, per Rapallo, J., said: "Our conclusion is, that although it [the evidence] might have required the jury to find that Ross was aware when he took laudanum that it would terminate his life, yet it would also have justified a finding that he acted under the control of an insane impulse caused by disease and derangement of his intellect which deprived him of the capacity of governing his own conduct in accordance with reason. An act committed under such circumstances cannot be regarded as voluntary or within the proviso of the policy": Id. 429. Again in 1877, under the same proviso (Weed v. Mutual Ben. L. Ins. Co., 70 N. Y. 561), the court, per Allen, J., said: "That the insured died 'by his own hand' is not disputed, and by this act the policy is avoided, unless his mind was so impaired that he did not understand the consequences of his action and that death would ensue. If he exercised volition, was capable of forming an intention, and with full knowledge that death would follow his action, his mind concurring in the act, he voluntarily destroyed his own life, the policy by its terms became 'null and void and of no effect.'" In 1843 the oft-cited case of Breasted v. Farmers' Loan & Trust Co., 4 Seld. (8 N. Y.) 299, 4 Hill (N. Y.), 73, 59 Am. Dec. 482, was decided. It appeared from the evidence that the insured drowned himself. The plaintiffs claimed that he was insane at the time of committing the act, and that therefore the policy was not avoided. The proviso was against death of the insured "by his own hand, or in consequence of a duel or by the hands of justice." In giving the opinion of the supreme court (4 Hill (N. Y.), 73), Nelson, J., said: "The question arising upon demurrer is whether self-destruction in a fit of insanity can be deemed a death by his own hand within the meaning of the policy. I am of the opinion that it cannot. . . . . The drowning of Comfort was no more his own act in the sense of the law than if he had been impelled by irresistible physical power, nor is there any reason for exempting the company from the risk assumed in the policy than if his death had been occasioned by such means." Millard, J., also distinguishes this case from that of Borradaile v. Hunter, 5 Man. & G. 639. Speaking of that case the learned judge says: "Upon an issue whether the assured died by his own hands, the jury found that he voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life and intending thereby to do so, but at the time of committing the act he was not capable of judging between right and wrong. It was held by the majority of the court, Tindall, C. J., dissenting, that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying proviso to acts of felonious suicide. The three judges who formed the majority laid the main stress upon the fact that the jury found the acts of self-destruction to be voluntary, that he knew when he threw himself into the river he should thereby destroy his life, and that he intended thereby to

do so. The referees in the present case have not found that the intestate acted voluntarily, or that he knew the consequences of his act. They merely find that while insane, for the purpose of drowning himself, he threw himself into the river, not being mentally capable of distinguishing between right and wrong. If Borradaile v. Hunter, 5 Man and G. 639, be an authority which we ought to follow, it differs so much from the case before us that we are at liberty to decide it upon principle." In both the opinion of the supreme court and that of the court of appeals, which contains a full discussion of the principles quoted (4 Seld. (8 N. Y.) 299), the court seemed to consider that the connection in which the words were used was an indication of an intent to refer to an act of self-destruction felo de se. Upon this point Nelson, C. J., said: "In popular language, the term 'death by his own hand' means the same as suicide or felo de se. . . . . The connection in which they are used in this policy indicates that the phrase 'death by his own hand' meant an act of criminal self-destruction." This case substantially held that the phrase "die by his own hand" referred to a voluntary act of self-destruction, and not to the taking of one's own life while insane and incapable of discerning between right and wrong. This question arose subsequently in connection with instructions to the jury by the judge, and in these cases (Mallory v. Travelers' Ins. Co. (1871), 47 N. Y. 52; Fowler v. Mutual L. Ins. Co. (N. Y. 1870), 4 Lans. 202) the doctrine stated in Breasted v. Farmers' Loan and Trust Company does not seem to be strictly adhered to, and in a case which arose in 1873 (Van Zandt v. Mutual Ben. L. Ins. Co. (1873), 55 N. Y. 169; 14 Am. Rep. 215) it was held that an insured person who takes his own life must be insane to such an extent as to render him unconscious that the act he does will cause his death, or he must commit it under the influence of some insane impulse which he cannot resist, in order to take the case out of the proviso. It was held not sufficient that the insured did not understand the moral nature and quality of the act which he was doing. This case cites and approves the case of Borradaile v. Hunter, and adopts the doctrine laid down in that and kindred cases. The case of Breasted v. Farmers' Loan and Trust Company, 8 N. Y. 299, has many times been cited as being contrary to the English and Massachusetts cases, and in fact the courts in many states have laid down a doctrine contrary to such decisions and have cited the decision of Breasted v. Farmers' Loan and Trust Company as supporting such a rule. Though this last decision does not expressly oppose the doctrine of Borradaile v. Hunter, and attempts to distinguish that case, yet it does in fact lay down a rule in conflict with such decision. But whatever doubt there may have been as to the rule in New York as laid down in the earlier decision, the court has in the Van Zandt case above noted expressly adopted the rule in Borradaile v. Hunter. In Meacham v. New York S. Mut. Ben. Assn. (1890), 120 N. Y. 237, 242, the by-laws provided against liability in case assured died "from suicide," and the court, per Parker, J., said: "Hay died by his own hand within eleven days after the issuance of the certifi-

cate. Unless, therefore, such self-destruction was the result of accident, mistake, or insanity, or was involuntary because driven to it by an insane impulse which disabled him from controlling his own action, Hay committed suicide within the meaning of the policy and it became void": Citing Van Zandt v. Mutual B. L. Ins. Co., 55 N. Y. 169; Newton v. Mutual B. L. Ins. Co., 76 N. Y. 426. *Rule in Ohio.*—In a case decided in Ohio in 1883 (Schultz v. Insurance Co., 40 Ohio St. 217), the proviso was, "shall under any circumstances die by his own hand," and it was held that as to the words "die by his own hand," the preceding words being disregarded as too general and uncertain, "the decided preponderance however favors the general rule and rejects the English doctrine," and the court adopted the rule laid down in Insurance Co. v. Terry, 15 Wall. (U. S.) 580, 584, in the United States supreme court. Two judges dissented. *Rule in Pennsylvania.* In a case in this state, decided in 1878 (Connecticut Mut. L. Ins. Co. v. Gwonn, 86 Pa. St. 92; 27 Am. Rep. 689), the condition was, "die by suicide," and it was held that if insured intended to take his own life and knew at the time that death would result from his act, and he was insane at the time, the policy was not forfeited, and the charge that insanity, in the sense in which the jury were to "consider it, must not be a mere disturbance of the intellect, but such a complete change in the moral and mental condition of the patient as would put an end to his responsibility as a free and intelligent being; unless the deceased was insane in this sense his death by his own act was suicide. . . . . If they found that he was not a responsible moral agent when he did the act which occasioned his death, they might find that it was not suicidal. . . . . If . . . . he was still able to discern that self-destruction was criminal and might have resisted the impulse to which he succumbed," the verdict must be for defendant. The point of inability to distinguish between right and wrong was also noted, and this was held no error. Woodward, J., also said: "When the disease attains a stage at which the mental power to judge of the moral nature of the act is entirely gone, self-destruction does not become suicide in the sense of self-murder." Again, in 1873 (American L. Ins. Co. v. Isetts, 74 Pa. St. 176), where the stipulation was, "die by his own hand," it was held no error to charge that "if the assured was not conscious of the act he was committing, but acted under an insane impulse or delusion sufficient to impair his understanding or will, or if his reasoning powers were so far overthrown by his mental condition that he was incapable of exercising his reasoning faculties with regard to the act of self-destruction, then the defendants are liable." And in 1853 (Hartman v. Keystone Ins. Co., 21 Pa. St. 466) it was declared that the proviso "die by his own hands" must be disconnected from the following words, "in or in consequence of duel," etc., but that the clause covered suicide by swallowing arsenic. *Rule in Tennessee.*—In Tennessee (Phadenhauer v. Germania L. Ins. Co. (1872), 7 Heisk. (54 Tenn.) 567; 19 Am. Rep. 623), where the condition was, "shall die by suicide or by his own hands," it was held to import a criminal act of

self-destruction; that the act of suicide, to be within the proviso, must be committed with mind enough for criminal intent; that it was not suicide if committed by one incapable of distinguishing between right and wrong, although capable of comprehending; that the means selected would cause the death, and that the act must also be voluntary. *Rule in Texas.* —In Texas, in the court of civil appeals (Mutual L. Ins. Co. v. Walden (Ct. Civ. App. Tex. 1894), 26 S. W. Rep. 1012), the policy contained a warranty not "to die by my own act," and the assured designedly killed himself by a pistol shot. The following charge was approved: "But if you should find that at the time the said Walden took his life his reasoning faculties were so far impaired that he was not able to understand the moral character or the general nature, consequences, and effect of the said act, or if he was impelled thereto by an insane impulse, then you will find for the plaintiff." The court, per Stephens, J., said: "The principal objection to the change is that it made the inability to understand the moral character of the act the test, though its physical nature, consequence, and effect may have been understood," and that the above rule is supported by the weight of authority. It was also declared by the court that the appellant, being a party to the leading case announcing the prevailing rule (Terry case, 15 Wall. (U. S.) 580; Insurance Co. v. Rodel, 95 U. S. 232), had full notice that the proviso would receive the same construction in a state where the English rule had not been adopted. *Rule in Vermont* —In a case decided in this state in 1875 (Hathaway v. National L. Ins. Co., 48 Vt. 335), the proviso was, "die by suicide," and a charge was held not erroneous which was in substance that if assured had sufficient mind, reason, and judgment to rationally consider and contemplate what he was doing and so took his own life, there could be no recovery; that it was not enough to warrant a recovery that assured's mind was unsound to some extent or so unsound that he was unable to distinguish right from wrong; that if an insane idea to take his own life possessed his mind, it being impaired, and that idea grew stronger and his mind, reason, and judgment weaker, and the idea became irresistible to take his own life, even though his mind contrived the means, then "in reality this insane idea or impulse, and not his mind or will, took his life," and it was held that insanity short of delirium or frenzy, whereby all power of self-will and control was lost, would excuse the suicide, and the court, per Pierpont, C. J., said: "It is not enough for the jury to find that the mind of the deceased is so impaired that he is incapable of distinguishing between right and wrong, but they must be satisfied that his mind was so overthrown that he had no power to resist the insane impulse to take his life, so that the act was the direct and immediate consequence and result of his insanity."

Opinions of Text-writers. — Mr. Bacon considers the rule laid down in the United States Mut. L. Ins. Co. v. Terry, 15 Wall. (U. S.) 580, 7 Alb. L. J. 310, and substantially followed in Michigan (John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41) as the most approved rule, one sustained by a preponderance of author-

ity, and the "settled rule in most of the states in the Union": 2 Bacon on Benefit Societies and Life Insurance, 2d ed., pp. 673, 675, sec. 334. Mr. Biddle says: "By the employment of the words "intentional self-destruction" and "suicide" the idea of a self-destruction consciously and intentionally brought about is intended," and upon the point whether the exception of liability in case of suicide and "whether the exception is intended only to apply to suicide in its technical sense—that is, a felo de se or self-murder by the insured who is conscious at the time of the moral nature of the act—or whether the exception is intended also to include intentional self-destruction by the insured when not at the time conscious of the moral nature of the act." This author reviews certain English cases (namely, Bayley v. Alexander, East. Not. Cas. 79; 1 Morley's India Dig. 352; Borradaile v. Hunter, 5 Man. & G. 639; Clift v. Schwabe, 3 Com. B. 436), and says: "It must be admitted that the reasoning in the above English cases is extremely difficult to answer, and that the result arrived at in the opinion of the author of this treatise is logically irresistible": 2 Biddle on Insurance, ed. 1893, 830, et seq. Mr. Bliss says: "It seems to us that the views taken by the courts of Massachusetts are most in accordance with the intentions of the parties to the contract. . . . . Indeed, between judges and juries, the reasoning revolves in a circle and utterly deprives the clause of any practical application. The juries say because a man killed himself otherwise than accidentally, therefore he must have been insane, and the judges say if a man was insane when he killed himself the policy is not forfeited. Under such a condition of things, there is practically no case left to which the clause can apply": Bliss on Life Insurance, ed. 1872, p. 392, sec. 238. Chitty says: "In criminal cases also, and as regards the protection from punishment for committed acts whilst in a state of mental derangement, the question is simple and adapted to the comprehension of every juryman, viz.: "Whether at the time the act was committed the prisoner was incapable of judging between right and wrong and that the particular act was an offense against the law of God and nature": Chitty's Medical Jurisprudence, ed. 1834, 344. Mr. Cooke, referring to the clause "die by suicide" and like clauses, says: "It seems universally agreed that its meaning is limited to intentional self-destruction, thus excluding cases of accident and uncontrollable impulse. For clearly it is an act on the part of the insured that is contemplated, and such act implies a will behind the act; in other words, a voluntary act is contemplated. Perhaps it scarcely needs adding that this implies a will to do the act that actually was done and not some other essentially distinct act; in other words, that the actor realized that the result was what in the natural course of things it would be. . . . . As it is the weight of authority is decidedly to the effect that the expression 'die by his own hand' involves, not only the idea that the act of self-destruction was voluntary, but that it was accompanied with a disability to distinguish right from wrong, or, as it has been expressed, to understand its moral aspect and char-

acter": Cooke on Life etc. Insurance, ed. 1891, p. 69, sec. 42. A recent medical authority uses the following language: "But it is said that an insane delusion or an irresistible impulse may be so marked as to preponderate over the rest of the intellect, so that the subject is no longer responsible for his acts. That is true, but if it leave him with sufficient intelligence to adapt means to ends and to know the result of a complicated act, such a grade of irresponsibility certainly should not abrogate this contract, made in good faith while he was perfectly sane, and set up in its stead another contract of very different import. If the delusion or impulse is so marked that he no longer understands the physical nature of the act, then it might be called an accident and as such would not be included within the proviso": 1 Hamilton's System of Legal Medicine, ed. 1895, 582, article, "The Medical Jurisprudence of Life Insurance," by Brandreth Symonds, A. M., M. D. Mr. Richards says: "The English, New York, and Massachusetts courts and others have adopted the view that, to take the case out of the proviso of the policy on the ground of insanity, the assured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some uncontrollable insane impulse. These courts hold that it is not sufficient to show that his mind was so impaired that he was not conscious of the moral obliquity of the act." He then states the rule given in Accident Ins. Co. v. Crandall, 120 U. S. 531 (Bigelow v. Berkshire L. Ins. Co., 93 U. S. 284; 19 Am. Rep. 628, n.), and adds: "The distinction between these two rules of law is probably too metaphysical to make it of any practical consequence whether the jury is charged in terms of the one or in terms of the other": Richards on Insurance, 2d ed., 208, sec. 184. Mr. Niblack says: "There is, however, an irreconcilable difference in the opinion of the courts as to their [clauses as to suicide] proper meaning, but also a noticeable want of harmony in the opinions of judges of different courts which have passed upon the subject": Niblack's Benefit Societies and Accident Insurance, 2d ed., p. 303, sec. 156. Mr. Phillips says: "I take our law to be that any mental derangement which would be sufficient to exonerate a party from a contract would render a person incapable of occasioning the forfeiture of a policy under this condition": 1 Phillips on Insurance, 3d ed., p. 486, sec. 895. See criticism in 4 Allen (Mass.), 96. "There are many circumstances going to show that it, 'self-destruction,' frequently originates from a deranged mind. One is, that although considerable forethought and ingenuity may have been evinced in preparing the means, yet when the attempt fails, in many cases, the individual after his recovery has either no recollection or a very faint one of the fact itself, receiving it upon the testimony of others": Dean's Medical Jurisprudence, ed. 1866, 509. "As a non compos cannot commit murder, so neither can he be felo de se": 1 Collinson on Lunacy, ed. 1812, 494, sec. 24. "A man insures his life. The circumstances connected with his chances of insanity are fully disclosed. His family antecedents are carefully

scanned for hereditary taint. A medical opinion and the testimony of his referees are taken upon the nature of his mental, as well as bodily, habits and constitution. The contract is made, and at the close of a long series of premiums paid his reason becomes undermined, melancholia fastens upon him, and he destroys himself; he meets death by his own hand, but it is not the less on that account the result of disease than is collapse and rigor the result of cholera": Article, "The Suicide Clause in Life Policies," 12 Sol. J. & R. (1868) 498. See article, "Life Insurance—Suicide," 1 Va. L. (1877) 197-203. "It is quite evident that the preponderance of the authorities is in favor of the proposition that voluntary suicide avoids a policy containing the usual provisos. Precisely what is meant by 'voluntary suicide' is not very apparent, but we infer from the language of the opinions that the term is intended to include all suicides not perpetrated in the 'madness of delirium.' This is a construction severely strict in favor of the companies. The proviso avoiding the policy in cases of suicide, etc., is the language of the company and is also in the nature of a forfeiture, and should for both reasons be construed, if its meaning is doubtful, in favor of assured": Article, "Suicide and Life Insurance, 4 Alb. L. J. (1871) 53; article, "Suicide in Life Insurance, Sane or Insane," 4 Cent. L. J. (1877) 51, and article 4 Cent. L. J. 75; article, "Suicide—Effect Upon a Life Insurance Policy" (1885), 21 Cent. L. J. 378, 382 (Charles B. Elliott); Annotated case, 25 Cent. L. J. 82 (William M. Rockel); n. 59 Am. Dec. 487, et seq.; Ray's Medical Jurisprudence of Insanity, 439, et seq.; Taylor's Medical Jurisprudence, ed. 1865, 1038, et seq.; 2 Paris and Fonblanque's Medical Jurisprudence, ed. 1823, 104, et seq. As to suicidal mania, see Maudsley's Responsibility for Mental Disease, ed. 1878, 133, et seq.; Mann's Medical Jurisprudence of Insanity, ed. 1893, 34-44, for judicial opinions in the different states where insanity was set as a defense to crime. Difficult to define insanity (Taylor's Medical Jurisprudence, ed. 1865, 1019), and the position of the courts thereon greatly varied: Elwell's Medical Jurisprudence, ed. 1871, 371-400, medical authorities, and 27 Howell's State Trials, 1290; Mosler v. Common, 4 Barr (Pa.), 266, per Gibson, C. J., and quoting Dr. D. Meredith Reese, to the effect that the latter is unprepared to lay down any better rule than that of "knowledge of right and wrong.' or the knowledge that the act was 'contrary to the laws of God and nature' at the time of its commission," notwithstanding the objection by the medical profession that "such 'knowledge' is often possessed by the insane who are unquestionably such." See notes 59 Am. Dec. 487; 3 Am. Rep. 454; 21 Am. Rep. 543; 19 Am. Rep. 628; 8 Am. St. Rep. 885, 886.

CHAPTER LVII.

EXCEPTED RISKS AND LOSSES—MARINE.

§ 2670. Excepted risks and losses: Marine risks generally.
§ 2671. Excepted risks and losses: Repugnant stipulations.
§ 2672. Excepted liability for loss caused by negligence, want of ordinary care, etc., gross negligence.
§ 2673. Excepted liability for damage unless caused by negligence
§ 2674. Warranted free from mortality.
of ship.
§ 2675. Exception of loss from specified cause followed by qualifying clause.
§ 2676. Exception of loss or damage from ice.
§ 2677. Exception of loss by barratry.
§ 2678. Excepted liability in bill of lading from damages arising from sweating, heat, steam, etc.
§ 2679. Explosion: Loss from bursting of boilers: Breaking or derangement of machinery: Steamboat clause.
§ 2680. Warranted free from insurrection.
§ 2681. Limited or prohibited trade: Prohibited waters.
§ 2682. Warranty against illicit, prohibited, or contraband trade: Against seizure therefor.
§ 2683. Exception of perils of the sea.
§ 2684. Warranted free from capture, etc: Capture by authority of de facto government.
§ 2685. A technical or actual capture or seizure not necessarily within the exceptions of these risks.
§ 2686. Capture and seizure may be synonymous.
§ 2687. Exception of loss by detention.
§ 2688. Other cases as to exception of capture, seizure, and detention.
§ 2689. Exception none the less binding because written on margin of policy.
§ 2690. Illegal seizure or attempt to seize within exception.
§ 2691. Warranted free from loss or damages arising out of collision of foreign powers or of our government with others.
§ 2692. Exception of loss from existing regulations does not include subsequently enacted decrees.
§ 2693. Warranted free from confiscation in ship's port or ports of discharge.
§ 2694. Exception of risk of blockaded port: Turned away, etc: Free of loss if not permitted entry, etc.

§ 2695. Exception of loss or damage to goods or property on deck unless, etc.
§ 2696. The memorandum clause—Generally.
§ 2697. What articles are within the clause.
§ 2698. Warranted free from average unless general.
§ 2699. Or the ship be stranded or burnt.
§ 2700. Warranted "free from average under — per cent clause unless general," and like clauses.
§ 2701. Unless it amount to — per cent and happen by stranding.
§ 2702. Exception of "loss or average" under specified per cent: Expense of repairs.
§ 2703. Percentage: Aggregation of losses in case of collision.
§ 2704. Value only of cargo at risk and not of whole cargo forms basis of percentage.
§ 2705. Each package subject to its own average and similar clauses.
§ 2706. Average recoverable on each package separately or on the whole.
§ 2707. Effect of separate valuation of each package, etc: Where there is and is not an insurance on each separate package, etc.
§ 2708. Where articles of different kinds are each separately valued.
§ 2709. Where percentage is fixed for each particular class or impliedly fixed upon each enumerated article.
§ 2710. Where insurance is upon cargo in bulk: General designation of "all other goods": Goods of distinct kinds under one general designation.
§ 2711. The question of addition of successive losses to reach the limitation: Cases.
§ 2712. Same subject: Conclusion.
§ 2713. Where liability is limited to invoice value.
§ 2714. Particular and general average losses cannot be aggregated nor are general average charges included in partial loss.
§ 2715. Addition of loss by jettison and salvage expenses.
§ 2716. Percentage clause qualified by agreement as to salvage expenses.
§ 2717. Whether certain other charges and expenses may be added.
§ 2718. Exception of loss under specified percentage: Other insurers.
§ 2719. Exception as to leakage, breakage, dampness, etc.
§ 2720. Whether under exception of loss under specified percentage the premium should be deducted.
§ 2721. Exception of liability under specified percentage: Deviation.
§ 2722. Exception of claim arising from canceling of charter.

§ 2670. Excepted Risks and Losses—Marine Risks Generally.—The clauses in marine policies excepting losses differ largely, although there are certain clauses common as to most of their provisions to all policies. The most general

division is into those exceptions which come under special warranties, and those covered by the "memorandum" clause. The decisions under the latter clause are numerous, and cover a great variety of points as to its construction. Those under the former class rest largely upon the particular language in which it is expressed, and its construction with reference to such rules of law as are applicable in the given case.

§ 2671. Excepted Risks and Losses — Repugnant Stipulations.—A printed stipulation limiting the liability of the insurer, whether it be a clause "free from average," or a limitation of liability from losses under a specified percentage, or an exemption of losses arising from or occasioned by designated or other limitations of liability, may be qualified, enlarged, or limited by a valid written clause, specific and certain in its provisions; for the rule that written clauses prevail over printed ones to which they are repugnant obtains as well in cases of this character as in others, but the clauses should be reconciled as far as possible, and the whole contract should be construed together in order to give effect to the intentions of the parties.[1] Thus, where the printed clause stipulated to be "free from average under ten per cent," and other printed clauses warranted to be "free from average unless general, and all other goods free from average under five per cent unless general," it was decided that the written clause controlled, and operated as a limitation of all averages to the ten per cent specified therein.[2]

§ 2672. Excepted Liability for Loss Caused by Negligence, Want of Ordinary Care, etc.—Gross Negligence. If it is stipulated that the insurer shall not be liable for perils, loss, misfortunes, or expenses consequent upon or arising from or caused by "the want or ordinary care and skill in navigating" the vessel there can be no recovery for general aver-

[1] Barnett v. Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385; Hernandez v. Sun Mut. Ins. Co., 6 Blatchf. (C. C.) 317; Coster v. Phœnix Ins. Co., 2 Wash. (C. C.) 51; Neilson v. Commercial Ins. Co., 3 Duer (N. Y.). 455.

[2] Coster v. Phœnix Ins. Co., 2 Wash. (C. C.) 51.

age expenses incurred in rescuing the vessel from a peril consequent upon negligence in navigating her.[3] So under a clause exempting from liability for "any loss occasioned by the negligence or misconduct of those in charge of the steamboat," there can be no recovery where the boat sinks at her mooring in consequence of overloading, the danger arising therefrom being so great that it was apparent long before the accident to many passengers inexperienced in navigation.[4] And under an exception for loss for want of ordinary care and skill "necessary and proper on such voyage and in said navigation," a want of ordinary care, skill, knowledge, attention, and seamanship, and ignorance of the channel and navigation on the part of the master and others constitutes a good plea in defense, and the same rule applies to an insurance on the cargo under a similar clause.[5] If the policy warrants that the boat shall be navigated free from any loss or damage by the negligence of those in charge of her at or before the time of any accident or disaster, this excludes a loss occasioned by the negligence of the pilot.[6] But if the exception be against want of ordinary care, and a vessel is run ashore and a storm arises after the stranding, and she is scuttled to save her and the cargo from total loss, the proximate cause of the loss is the storm and not the stranding, and the loss is not within the exception.[7] Although under a like exception where a steamer, stranded in a fog on an island, rides out of her course and was abandoned, and it appeared that she had a defective compass and was without a lookout, and was violating a statute regulating the speed to be maintained in a fog, it was held that it was incumbent, in order to recover, to show that these facts neither caused nor contributed

[3] The Ontario, D. C. E. D. Mich., 37 Fed. Rep. 220.

[4] Empire Parish Packet Co. v. Union Ins. Co., 32 La. Ann. 1081.

[5] Gillespie v. British American F. & L. Assur. Co., 7 U. C. Q. B. 108.

[6] Levy v. New Orleans Mut. Ins. Assn., 2 Woods (C. C.), 63.

[7] Northwestern etc. Ins. Co. v. Boston M. Ins. Co. (C. C. E. D. Mich.), 41 Fed. Rep. 793. But see The Ontario (D. C. E. D. Mich.), 37 Fed. Rep. 220.

to the loss, but that it arose from a peril insured against.[8] The term "gross negligence," as used in a policy exempting from loss on that account, is the want of that diligence which even careless men are accustomed to exercise. If one omits slight diligence, he is grossly negligent, for he fails in the lowest degree of prudence.[9] The fact of want of ordinary skill and care must be clearly found to bring the loss within the exception, for if there are inconsistent findings upon the point whether the acts of a master are those of a careful, skillful, and prudent seaman, and whether his acts were justified, a new trial may properly be granted.[10]

§ 2673. Excepted Liability for Damage Unless Caused by Negligence of Ship.—In a comparatively recent case the bill of lading excepted liability for damage to fruit by frost unless caused by negligence of the ship. The steamship was loaded with green fruit in one hold and general merchandise in another. On the vessel's arrival in New York in February it commenced discharging the fruit, which could have all been discharged during the day, which was a warm one; but in accordance with the request of certain consignees, the libelant assenting, the unloading was discontinued and was not again commenced until the fourth day thereafter, and completed the fifth day, the intervening days being cold. The fruit was transferred to a warehouse, and was subsequently found to be frozen, but was frozen before it was discharged from the vessel, and it was held that there was no negligence, and the exception in the bill of lading protected the ship from liability, and that she was not obligated during the cold weather to suspend discharging from the holds in which there was no fruit for the purpose of protecting the fruit in the other hold from liability to injury from frost.[11] But the ship may be liable for loss resulting

[8] Richelieu & O. Nav. Co. v. Boston M. Ins. Co., 136 U. S. 408-10.

[9] Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Campbell v. Monmouth Mut. Fire Ins. Co., 59 Me. 430.

[10] Lawton v. Royal Canadian Ins. Co., 50 Wis. 163.

[11] The Alesia, 35 Fed. Rep. 531.

from negligence in stowage even though within the exceptions of a bill of lading; as where the dunnage wood placed between all the drums of a consignment of glycerine on board a steamship had fallen out during the voyage from between two drums only, whereby they were cut by chafing together, and the glycerine leaking out, the voyage being a rough one, it was held that the only fair inference was that these two drums were not properly secured according to the usual manner.[12]

§ **2674. Warranted Free from Mortality.**—Where live-stock is insured under a policy with a warranty "free from mortality and jettison," reference must undoubtedly be had to the intention of the parties as evidenced by the language employed. Thus, mortality is held to mean a death arising from natural causes, and not a violent one; as where the live-stock insured under a similar exception so wounded and bruised each other, by reason of the laboring of a vessel in a severe storm, that they died, this was declared a loss by the perils of the sea, and not within the exception.[13] The effect of a special clause limiting the risk to mortality from certain causes would be to exclude mortality from other causes.[14] Reference must also be had to the fact whether the mortality arose from a peril insured against as the proximate cause, or whether it was superinduced by other causes, natural inherent vice, or otherwise.[15] In case the warranty "to be free from mortality or jettison" in an insurance on live-stock has by practice among underwriters received a certain construction, the assured is not bound thereby, unless he is shown to have been cognizant thereof, either expressly or impliedly.[16]

§ **2675. Exception of Loss from Specified Cause Followed by Qualifying Clause.**—If the policy contains a

[12] Marks v. The Britannia, 34 Fed. Rep. 906.

[13] Lawrence v. Aberdeen, 5 Barn. & Ald. 107; Garbay v. Lloyd, 3 Barn. & C. 793.

[14] Jones v. Schmoll, cited 1 Term. Rep. 130.

[15] Tatham v. Hodgson, 6 Term Rep. 656.

[16] Gabay v. Lloyd, 3 Barn. & C. 793; 5 Dowl. & R. 541.

stipulation exempting the insurers from loss to a cargo from a specified cause limiting the generality of exception, it will be construed with reference to such qualifying clause. Thus, if a cargo of ice is insured, exempting the insurers for loss from the ice melting "in consequence of putting into port," this will not include a loss occasioned by the melting of ice from other causes, such as the leaking of the vessel, and the necessary unloading of ice to examine and repair the vessel in a tropical port where the vessel is by reason of distress.[17] But where a cargo of wheat on board a canal-boat in the port of New York was insured against certain perils while "lying up as aforesaid," with an exception of ice from the perils enumerated, and the policy also gave permission that the boat be towed from place to place in port, the clause "lying up as aforesaid" covers the boat while being towed, and the insurers are not liable for injury by ice during that time.[18] Although in case of illicit or prohibited trade, and the exception be limited as to existing regulations, this clause will not bring a loss arising subsequently within the exception.[19] The company will be discharged only as to any loss arising from towing by a vessel of that character.[20]

§ 2676. Exception of Loss or Damage from Ice.—If the policy contains an exception of liability for loss from ice, reference should be had to the fact whether ice is the proximate cause of the loss. And if the policy be on time, the exemption is not limited to the season of navigation where ice is clearly the proximate cause of the damage;[21] but if the policy provides that it shall cease if the boat is "prevented or detained by ice or the closing of navigation from terminating the trip," the being detained by ice means detention in the ordinary course of navigation, and does not exempt a loss, the predominating and efficient cause of which is a storm; as where boats being towed are separated from the tugs by a gale which

[17] Tudor v. New England etc Ins. Co., 12 Cush. (Mass.) 554.
[18] Dows v. Howard Ins. Co., 5 Rob. (N. Y.) 473.
[19] Wood v. New England M. Ins. Co., 14 Mass. 31.
[20] Grant v. Lexington etc. Ins. Co., 5 Ind. 23; 61 Am. Dec. 74.
[21] Allison v. Corn Exchange Ins. Co., 57 N. Y. 87.

drives them ashore, where they are stranded, and ice forms around them in the night so that the tugs cannot reach them, even though the channel of the river is open, and the boats remain frozen in till a thaw, when they are sunk by the wind and ice and the cargo injured.[22]

§ **2677. Exception of Loss by Barratry.**—If the policy provides that the underwriter shall be free from all losses caused by barratry, mere carelessness or unskillfulness of the master will not release the insurer, there being no fraud or criminal conduct on his part.[23] And where barratry of the master is excluded, the assured being owners, and the command of the vessel devolved upon the second mate during the course of the voyage, his acts while in command were held those of a mariner, and one of the risks covered by the policy.[24] So an exemption of loss "by barratry of the master if the master is owner," it is held, will not release the insurers in case of an insurance on a vessel by the holder of a bill of sale, the vessel being registered in his own name, it appearing that the original owner was owner pro hac vice, having retained possession and control of the vessel, and victualing, manning, and sailing her at his own expense, and the master having fraudulently run her ashore, and the vessel being totally lost.[25] Again, if loss by barratry be excepted, the insurers are not released by reason of mere error on the part of the pilot, where by a collision and consequent exposure, fire results.[26] And if a policy be to a named person "on account of whom it might concern," with a clause, "loss by barratry not taken if assured be owner of the vessel," the defense of barratry of the master would be valid, if the intention was to insure the owners of the vessel; or, the contract being indivisible, then the defense could be availed of if it was intended to insure the persons named and the owners.[27]

[22] Brown v. St. Nicholas Ins. Co., 61 N. Y. 332.

[23] Louisville Underwriters v. Pence, 93 Ky. 96; 19 S. W. Rep. 10; 21 Ins. L. J. 493.

[24] Tate v. Protection Ins. Co., 20 Conn. 481.

[25] Clark v. Washington Ins. Co., 100 Mass. 509.

[26] Germania Ins. Co. v. Sherlock, 25 Ohio St. 33.

[27] Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596.

§ 2678. Excepted Liability in Bill of Lading from Damages Arising from Sweating, Heat, Steam, etc.—If the bill of lading excepts liability for damages to the cargo from "damages arising from sweating, heat, steam," etc., and it appears that the cargo was stowed in the customary manner, and that being a quantity of Brazil nuts and a portion of the crop particularly liable to become heated, and that it was carefully watched and ventilated so far as possible, but that stress of weather necessitated keeping on the hatches during a portion of the voyage, it is held that negligence of the vessel must then be shown to bring a damage to the cargo from heat and sweat within the exception.[28]

§ 2679. Explosion—Loss from Bursting of Boilers or Breaking or Derangement of Machinery—Steamboat Clause.—Insurers are not liable for damage resulting "on account of" bursting of boilers where by a policy of insurance upon the body, tackle, apparel, and other furniture of a propeller the insurers are not to be liable "for" the bursting of boilers.[29] So where the policy excepted from the perils insured against "damage that might be done by the bursting of boilers," but provided that only "loss or damage occurring subsequent to and in consequence of the bursting of boilers is covered by this policy," and the boiler of the vessel burst, the explosion being so violent as to tear open the side of the vessel to such an extent that she was immediately submerged, it was held that as the vessel was rendered worthless the moment the rents and apertures were made, the loss was not subsequent to the explosion within the intent of the words, and that the policy did not cover the loss.[30] And where a marine contract binds the insurers for all losses occasioned by fire except from explosion of boilers while the vessel is navigated upon the waters named in the policy and within the assured's control, but in a subsequent clause excepts claims for loss or damage occasioned by the "collapsing of flues," this does not

[28] The Portuense, 35 Fed. Rep. 670 (annotated case).
[29] Strong v. Sun Mut. Ins. Co., 88 Am. Dec. 242; 31 N. Y. 103.
[30] Evans v. Columbian Ins. Co., 44 N. Y. 146; 4 Am. Rep. 650.

cover a loss by fire occasioned by the collapsing of a flue.[31] And if the policy provides that the insurers are to be not liable for any "breakage or derangement of the engine, or the bursting of the boiler, or any parts thereof," the insurers are only relieved from liability to indemnify the assured for broken or deranged machinery, and are not exempt from obligations to pay for a total loss, even though such loss could be traced back to the breaking of the machinery as its first cause.[32] So where the contract provided an exemption from liability for loss by the breaking of any part of the machinery, and the boat broke her shaft while being towed, and sprung a leak and sunk, it was held that the insurer was not released by the existence of one of the excluded causes, unless the loss was due to that cause.[33] In another case, where the stipulation was against "any loss occasioned by fire except when caused by explosion of boiler," and the policy also warranted against loss by "bursting of boilers, collapsing of flues, or the consequences of any character resulting from either of the foregoing exceptions," the insurer was held liable for all losses occasioned by fire except from explosion of boilers.[34] So where a steamboat was insured for a certain voyage, the company not to be liable for breakage or derangement of the engine or bursting of the boiler, or for effects of fire from any cause connected with the operation or the repair of engine or boiler, unless the damage was occasioned by stranding or sinking of the vessel after her engine or boiler shall have been put in successful operation, it was held that if the immediate or proximate cause of loss was stranding, notwithstanding the loss could be traced back to a breakage of machinery, the "steamboat clause" did not exonerate the insurers from liability.[35] But it is held that where the policy provides that the insurers shall not be liable for breaking of the machinery un-

[31] Louisville Underwriters v. Durland, 123 Ind. 544; 7 L. R. Annot. 399.

[32] Western Ins. Co. v. Cropper, 32 Pa. St. 351; 75 Am. Dec. 561.

[33] Union Ins. Co. v. Smith, 124 U. S. 405; 8 Supr. Ct. 534. See Orient Ins. Co. v. Adams, 123 U. S. 67.

[34] Louisville Underwriters v. Durland, 123 Ind. 544; 24 N. E. Rep. 221.

[35] Commercial Ins. Co. v. Cropper, 21 Md. 311.

less occasioned by stranding, this will render insurers liable, where the vessel is injured first by perils of the sea and afterward by stranding, for so much of the injury only as the assured proves to have been occasioned by the stranding.[36] If there be an exemption from loss by explosion occurring at the time of the entry or indorsement under a running policy, provided the occurrence "might be known to the applicant, the public, or the company at the time," the application should be made whether the property insured "was known to be involved therein or not," and the vessel's boiler has exploded at the time the application is made, the policy does not cover a loss on goods, although the goods are not known to be on board.[37] It is evident from the above cases that the courts will consider the proximate cause of the loss, in construing clauses of this character, in connection with the facts of the case, and that the tendency also is to favor the assured, where the construction so admits, without departure from the intent evidenced by the words chosen. Some of the cases, however, can well be compared with cases discussing the same principles under fire policies, noted elsewhere.[38]

§ 2680. Warranted Free from Insurrection.—A warranty on a cargo of slaves to be free from insurrection means that the insurers shall not be liable for a loss therefrom, and not that there shall be no instruction.[39] This case is chiefly valuable at the present day because of the distinction between a warranty against an act and a warranty that there shall be no loss from that act; as well also as for the assertion therein of the principle that the proximate cause of the loss does not necessarily mean the last cause.

§ 2681. Limited or Prohibited Trade—Prohibited Waters.—If trade is limited to certain ports and places,

[36] Heebner v. Eagle Ins. Co., 10 Gray (Mass.), 131; 69 Am. Dec. 308.

[37] Mark v. Ætna Ins. Co., 29 Ind. 390.

[38] "This company is not to be held liable . . . . in case of insurance upon a steamer for any injury to the machinery or boilers, unless occasioned by stranding, sinking, burning, or collision with another vessel": Exception in a form used in San Francisco.

[39] McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 202; 43 Am. Dec. 180.

or if trade with certain ports and places is excluded or prohibited by the terms of the policy, the stipulation binds the assured to an observance of the contract, and a breach avoids the contract, but in case a trade is confined to certain ports in specified places, or in designated seas, the assured may prove that the trade described in the policy included as a part thereof, or as incidental thereto, a direct voyage between certain of the ports to which it is limited.[40] But the ship's destination constitutes an important factor in determining the trade in which she is engaged;[41] and where trade with "all guano islands except the Chinchas" was prohibited, and the vessel loaded at Navassa, in the Caribbean Sea, with a product of that island claimed to be mineral phosphate, it was held that the insured must show that the character of the cargo was not such as to constitute a breach.[42] So if certain waters be prohibited, or if their navigation be prohibited within specified times, the insurer will be released by a breach of the stipulation by assured, and a permission to navigate certain waters above or below or within specified limits is binding upon the parties, and must be observed, or there can be no recovery.[43] And the same rule would also apply to the rules of an association.[44] In another case a vessel was insured, while on her voyage from Liverpool to New Orleans, which latter port was known to be her home port, "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea." Another clause ran thus: "Warranted by the assured not to use ports in eastern Mexico, Texas, nor Yucatan, nor

[40] Mallory v. Commercial Ins. Co., 9 Bosw. (N. Y.) 101.

[41] Harvey v. Beckwith, 12 Week. Rep. 816, 819; 10 L. T., N. S., 632.

[42] Whiton v. Albany City Ins. Co., 109 Mass. 24. In this case public documents of the United States showing the recognized character of the island as a guano island was held wrongly excluded.

[43] Odiorne v. New England Mut. Ins. Co., 101 Mass. 551; Wilkins v. Tobacco Ins. Co., 2 Cinc. (Ohio), 204; Wheeler v. New York Mut. Ins. Co., 3 Jones & S. (N. Y.) 247; Bearns v. Columbian Ins. Co., 48 Barb. (N. Y.) 445; Provincial Ins. Co. of Canada v. Leduc, 43 L. J. P. C. 49; 22 Week. Rep. 927; Cobb v. Lime Rock M. Ins. Co., 58 Me. 326; Day v. Orient Mut. Ins. Co., 1 Daly (N. Y.), 13. See Greenleaf v. St. Louis Ins. Co., 37 Mo. 25; Teuton v. Fry, 5 Cranch (U. S.), 335; Palmer v. Warren Ins. Co., 1 Story (C. C.), 360.

[44] Harvey v. Beckwith, 12 Week. R. 896, 819; 10 Law T., N. S., 632.

anchorage thereof." The vessel was lost in the Gulf of Mexico on her return trip from New Orleans to Liverpool, and it was held that the insurance covered the loss.[45]

§ **2682. Warranty against Illicit, Prohibited, or Contraband Trade—Against Seizure Therefor.**—Although a trade which is made illegal by the laws of the country to which the subject insured is bound or to which it is to be carried is illicit trade, yet the tribunals of other countries will not recognize as illegal a trade which the officers of that government may, to suit their own purposes, choose to arbitrarily designate as unlawful.[46] An exception of illicit trade does not necessarily concern actual buying and selling, but refers to illicit acts concerning the management of the adventure, by reason of which the property is subject to seizure.[47] If a trade is in no other way unlawful than in consequence of an accident over which assured has no control, the underwriters cannot avail themselves of it as a breach of warranty.[48] A mere attempt at trading is held within the exception, and the risk is forfeited thereby.[49] Under a warranty against seizure on account of illicit trade the underwriters are liable for a loss by illicit trade barratrously carried on by the master.[50] An insurer is also liable for damages sustained by the detention of a vessel having prohibited goods shipped by the master for smuggling, though there is a clause that the insurer shall be free from charge on account of any illicit or prohibited trade.[51] So if the goods described are known to be prohibited,

[45] Merchants' Ins. Co. v. Allen, 121 U. S. 67.

[46] Thompson v. Mississippi Ins. Co., 2 La. 228; 22 Am. Dec. 129.

[47] Smith v. Delaware Ins. Co., 3 Wash. (C. C.) 127; Andrews v. Essex Ins. Co., 3 Mason (C. C.), 6.

[48] Savage v. Pleasants, 5 Binn. (Pa.) 403.

[49] Andrews v. Essex M. Ins. Co., 3 Mason (C. C.), 6; Descrow v. Waldo Mut. Ins. Co., 43 Me. 460; Church v. Hubbard, 2 Cranch (U. S.), 165. See Higginson v. Pomeroy, 11 Mass. 104.

[50] The illicit trade must be carried on by the insured himself or with his knowledge and assent: Dunham v. American Ins. Co., 2 Hall (N. Y.), 422; Suckley v. Delafield, 2 Caines (N. Y.), 222.

[51] American Ins. Co. v. Dunham, 12 Wend. (N. Y.) 436; affirmed, 15 Wend. (N. Y.) 9.

they are not without the exception.[52] The trading by a domiciled alien carried on between the United States and the enemies of his mother country is protected under the warranty against illicit trade.[53] Illicit trade is not legalized by the unauthorized permission of an officer of the government.[54] The risk of illicit trade must be taken with knowledge, express or implied.[55] If the insurer and insured know there are contraband goods on board, and yet insurance is effected on lawful goods with a warranty against contraband, the warranty applies only to the lawful goods.[56] So the exception refers only to the goods of the assured, and not to those of other shippers.[57] If the vessel is admittedly a prize of war, as enemies' property, no defense can be rested on the warranty against illicit or prohibited trade in contraband of war.[58] Again, there is no breach of warranty of illicit trade by the owner of a vessel unless she is engaged in a trade which would furnish ground for her legal condemnation.[59] So if the perils are excepted of illicit trade and trade in articles contraband of war, and the vessel is not violating any belligerent rights because of want of knowledge of a blockade, and there is a hostile capture, the insurers are not released.[60] A warranty against illicit trade releases the insurers in case of a breach, although the act be prohibited subsequently to the insurance.[61] It is held that a condemnation jure belli and for a breach of municipal regulations will falsify the warranty by which the insurer was protected from loss from illicit trade.[62]

[52] Seton v. Delaware Ins. Co., 2 Wash. (C. C.) 175.

[53] Johnston v. Ludlow, 1 Caines Cas. (N. Y.) 29.

[54] Tucker v. Juhel, 1 Johns. (N. Y.) 20.

[55] Andrews v. Essex F. & M. Ins. Co., 3 Mason (C. C.), 6.

[56] Bowne v. Shaw, 1 Caines (N. Y.), 489. See DePeyster v. Gardner, 1 Caines (N. Y.), 492; Maitland Ins. Co. v. Bathurst, 5 Gill & J. (Md.), 159.

[57] Cucullu v. Louisiana Ins. Co., 6 Mart. (La.) 464; 16 Am. Dec. 199.

[58] Merchants' Ins. Co. v. Edmond, 17 Gratt. (Va.) 138.

[59] Thompson v. Mississippi Ins. Co., 2 La. 288; 22 Am. Dec. 129.

[60] Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348.

[61] Smith v. Delaware Ins. Co., 3 Wash. (C. C.) 127.

[62] Cucullu v. Louisiana Ins. Co., 5 Mart., N. S. (La.) 464; 16 Am. Dec. 199.

And the fact that assured has deposited or disposed of the contraband goods before the seizure does not relieve assured from the breach of warranty.[63] The warranty against seizure from illicit trade does not release the insurers from a detention which properly comes within the clause as to "arrests and detainments of princes." [64]

§ **2683. Exception of Perils of the Sea.**—If an insurance on goods and on commissions as consignee excludes "all loss and expense that may arise from the ordinary dangers and perils of the sea," a loss consequent upon thick weather is not within the policy, even though such exception would cover a loss by capture, yet the proximate cause must be considered, and the fact that the vessel had been taken and was in charge of a prize-master and men, and was being taken into port where she was lost, does not make the insurers liable.[65] If the unseaworthiness of the vessel at the time of sailing on the voyage caused or contributed to produce the necessity for a jettison, the loss is not within the exception of perils of the seas, and the carrier is liable for nondelivery of the goods.[66]

§ **2684. Warranted Free from Capture, etc.—Capture by Authority of De Facto Government.**—It is not necessary that the capture be made under authority of a perfectly lawful government. A capture is lawful when made by a declared enemy, lawfully commissioned and according to the laws of war. Thus, where a vessel was warranted free from capture and was burned by the commander of a privateer, acting under a commission issued to him by the government of the confederate states, the loss was held attributable to the capture, and not a taking of pirates or assailing thieves or by fire, and the fact that the war is a civil one renders the capture none the less one,[67] upon the ground that during the war of

[63] Carrington v. Merchants' Ins. Co., 8 Pet. (U. S.) 495.

[64] Mumford v. Phœnix Ins. Co., 7 Johns. (N. Y.) 449.

[65] Law v. Goddard, 12 Mass. 112.

[66] Dupont De Nemours v. Vance, 19 How. (U. S.) 102.

[67] Dole v. New England Mut. M. Ins. Co., 2 Cliff. (C. C.) 394. (In this case the insurance was on the ship warrant-free from capture, seizure, or detention, the risks covered being perils of the sea, fire,

the Rebellion the seceding states were a de facto government, and although erected by unlawful and unconstitutional means, they were clothed with many of the highest attributes of government, had adopted a constitutional form therefor, had sufficient resources of men and money to carry on a war of unexampled dimensions, were recognized as belligerents by the British government, and treated as such from the outset by the supreme government, and therefore were the supreme power of the states in rebellion.[68]

§ 2685. A Technical or Actual Capture or Seizure not Necessarily within the Exceptions of these Risks.—The fact that there is a technical or actual capture or seizure does not necessarily bring such capture or seizure within the exception as to these risks. Thus, the seizure of a vessel by the mutinous acts of the crew is not within a warranty to be free from capture, seizure, or detention.[69] And where the war-

enemies, pirates, assailing thieves, restraints, and detainments, and the policy was executed prior to the secession); Swinnerton v. Columbian Ins. Co., 37 N. Y. 174; 9 Bosw. (N. Y.) 361; 93 Am. Dec. 560 ("warranted free from loss or expense arising from capture, seizure, or detention, or in consequence of any attempt thereat." In this case the vessel was seized and sunk by a large body of men professing to act by authority of the state of Virginia); Fifield v. Pennsylvania Ins. Co., 47 Pa. St. 166; 86 Am. Dec. 523 ("loss by seizure, capture, or detention or the consequence of any attempt thereat"; vessel seized by privateer in commission of confederate government); Mauran v. Insurance Co., 6 Wall. (U. S.) (same exception; vessel was seized by officers and crew of steamer belonging to confederate states); Dole v. Merchants' M. Ins. Co., 51 Me. 465 (same exception; vessel seized by confederate cruiser; held, also, that the fact that the war is a civil one renders the capture none the less one, and that the words "capture and seizure" were broad enough to cover a taking by pirates; there was appended to the clause, however, the words "any stipulation in this policy to the contrary, notwithstanding"); Dole v. New England Mut. Ins. Co., 6 Allen (Mass.), 373 (same exception; vessel seized by armed steamer commanded by Semmes, a citizen of the state of Maryland claiming authority of confederate government. Maryland, however, had not then seceded.)

[68] Mauran v. Insurance Co., 6 Wall. (U. S.) 1. See, also, Robinson v. International Assur. Soc., 52 Barb. (N. Y.) 450; 42 N. Y. 54; cases last note.

[69] Greene v. Pacific etc. Ins. Co., 9 Allen (Mass.), 217.

ranty was "free from loss or destruction by or arising from any belligerent nature, or any seceding state or states of the Union," it was held that although the forcible taking of possession by the United States government was a capture, yet it was not within the exception, and that there was neither an absolute nor a technical total loss, the government having satisfied the amount nearly in full.[70]

§ **2686. Capture and Seizure may be Synonymous.**—If an insurance be against capture, but warranted free from seizure within a specified jurisdiction, the word "capture" will be held synonymous with "seizure" when the capture is made in a place excepted by the warranty.[71]

§ **2687. Exception of Loss by Detention.**—If the goods insured are warranted free from detention by specified powers, and she is stopped by a blockading squadron of one of those powers, and ordered back under pain of capture and condemnation, this is a loss by detention by said power within the exception.[72]

§ **2688. Other Cases as to Exception of Capture, Seizure, and Detention.**—A warranty against any loss by seizure or detention extends only to partial losses occasioned by a seizure or temporary detention not followed by a condemnation.[73] In case of a warranty to be free from capture or seizure in a port of discharge, the main question seems to be whether the vessel was in her port of discharge with the design of there discharging her cargo, and was within danger of capture from the land, and that she might be within said port if at a place where ships usually unload, or where she is lying on and off a river or estuary, provided she intends to discharge

[70] Murray v. Harmony F. & M. Ins. Co., 58 Barb. (N. Y.) 9; Kellner v. Le Mesurier, 4 East, 396, 402, per Lord Ellenborough; Brandon v. Curling, 4 East, 410. But see Emerigon on Insurance, Meredith's ed. 1850, c. xxi., secs. 32, 33, pp. 429-34.

[71] Black v. Marine Ins. Co., 11 Johns. (N. Y.) 287.

[72] Wilson v. United Ins. Co., 14 Johns. (N. Y.) 227.

[73] Johnston v. Ludlow, 2 Johns. Cas. (N. Y.) 481; 1 Caines Cas. (N. Y.) 29.

at such place, and that the mere fact of capture by a force from the shore is not of itself sufficient when the other factors are wanting.[74] If the exception is from loss by French risks, a capture by a French privateer is within the exception, and discharges a policy, so that the insurers will not be liable for any loss which may subsequently happen.[75] And where the exemption was from capture, and the vessel was driven ashore and captured, the capture was held the proximate cause of loss.[76] And where under such a warranty the vessel went ashore off the confederate coast, and part of the cargo was prevented from being saved by the interference of confederate officers, it was held that so much of the cargo as was lost as a consequence of hostilities was within the exception.[77]

§ 2689. Exception None the Less Binding Because Written on Margin of Policy.—A warranty to be free from capture, seizure, or detention renders the insurers no more liable for a loss within the exception than if contained in the body of the policy, and the legal effect of such a warranty is the same as if it had been that insurers should not be liable for such losses.[78]

§ 2690. Illegal Seizure or Attempt to Seize Within Exception.—An illegal seizure or attempt to seize is so far within an exception against seizure as to exempt the insurers from loss under the warranty. This was so held where a vessel flying the British flag was intentionally fired into by a

[74] 1 Arnould on Marine Insurance, Perkins' ed. 1850, *871-73; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 838 et seq.; citing Dalgleish v. Brooke, 15 East, 295; Oom v. Taylor, 3 Camp. 204; Maydew v. Scott, 3 Camp. 205; overruling Keyser v. Scott, 4 Taunt. 660; Jarman v. Coape, 13 East, 394; 2 Camp. 613; Reyner v. Pearson, 4 Taunt. 662; Levin v. Newinham, 4 Taunt. 722; Mellish v. Stamforth, 3 Taunt. 499; Levy v. Vaughan, 4 Taunt. 387.

[75] Roget v. Thurston, 2 Johns. Cas. (N. Y.) 248.

[76] Coolidge v. New York Fireman's Ins. Co., 14 Johns. (N. Y.) 308.

[77] Ionides v. Universal M. Ins. Co., 14 Com. B., N. S., 259; 32 L. J. C. P. 170.

[78] Dole v. New England etc. Ins. Co., 2 Cliff. (C. C.) 394. In Swinnerton v. Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560, the stipulation was in margin of policy.

Russian fort and sunk, under an alleged mistake as to the nationality of the flag, there being a war between Turkey and Russia, although no hostilities then existed between England and Russia. The court was of opinion that the object of the Russians was to detain the ships.[79]

§ **2691. Warranted Free from Loss or Damage Arising Out of Collision of Foreign Powers or of Our Government with Others.**—Where the warranty was to be free from all claim for loss or damage arising from or growing out of collision with foreign powers or of our government with others," and the vessel was destroyed by fire by reason of the burning of all the cotton in and about the city under orders of the insurgent military commander, in whose possession the city then was, during the war of the Rebellion, it was held that the loss was within the exception.[80]

§ **2692. Exception of Loss from Existing Regulations does not Include Subsequently Enacted Decrees.**—If the exception be of loss from existing regulations of any belligerent, the insurer is nevertheless liable for a loss arising under a decree passed subsequently to the execution of the policy.[81]

§ **2693. Warranted Free from Confiscation in Ship's Port or Ports of Discharge.**—Under this warranty, if the port of discharge is that of one government, and the vessel is there boarded by a privateer of another government, and taken into one of the latter's ports and condemned, this is not a confiscation in the ship's port of discharge, but a capture by the latter government.[82]

§ **2694. Exception of Risk of Blockaded Port—Turned Away, etc.—Free of Loss if not Permitted Entry, etc.**

[79] Powell v. Hyde, 3 El. & B. 607; 25 L. J. Q. B. 65. See Goss v. Withers, 2 Burr. 683, 694, 695, per Lord Mansfield; Emerigon on Insurance, Meredith's ed. 1850, c. xii., sec. 18, p. 353.

[80] Marcey v. Merchants' etc. Ins. Co., 19 La. Ann. 388.

[81] Wood v. New England Ins. Co., 14 Mass. 31.

[82] Levin v. Allmitt, 15 East, 267, per Lord Ellenborough as to definition of "confiscation."

If there is a warranty that insurers "take no risk of a blockaded port, but if turned away the assured to be at liberty to proceed to a port not blockaded," it is held that the insurer is protected from every loss happening in consequence of a blockade, whether such blockade were strictly legal or not.[83] And under a clause of like character it is held that a fear of danger of blockade which prevents proceeding to the port of destination releases insurers.[84] Again, where the warranty was to be "free from loss if not permitted entry," by reason of having negroes on board, and the vessel anchors at the usual place where vessels stop to be disinfected, and is lost before permission can be obtained to land the negroes, the insurers are liable.[85]

§ **2695. Exception of Loss or Damage to Goods or Property on Deck Unless, etc.**—If the policy stipulates that the insurers shall not be liable for loss or damage to property on deck unless by special agreement in writing indorsed on the policy, and the policy also provides that "it shall be lawful for such boats to load in such a manner as is usual and customary for vessels employed in the navigation aforesaid to be laden, without reference to any provisions on the same subject in marine law or custom applicable to vessels laden for sea voyages," the two stipulations must be construed together, and will permit the carrying of goods on deck without an agreement indorsed on the policy if it is customary to carry goods on deck of the character of those so carried, and there being no evidence that the insurers were ignorant of such custom, they were held liable for goods so carried without indorsement in writing consenting thereto.[86]

§ **2696. The Memorandum Clause—Generally.**—Under the memorandum clause covering certain enumerated articles perishable in their nature, the insurers stipulate a limitation of

[83] Radcliff v. United Ins. Co., 7 Johns. (N. Y.) 38; 9 Johns. (N. Y.) 277.

[84] Ferguson v. Phœnix Ins. Co., 5 Binn. (Pa.) 544.

[85] Dickey v. United Ins. Co., 11 Johns. (N. Y.) 358.

[86] Allen v. St. Louis Ins. Co., 85 N. Y. 473.

their liability, and the terms used are various,[87] giving rise to numerous cases as to their construction and effect. In certain cases there is a clause separate and apart from the memorandum clause, whereby all merchandise not excepted from the memorandum is "free from particular average and partial loss," and the insurance is against "loss or damage only when occasioned by stranding, sinking, fire, collision, or other extraordinary peril, and amounting to fifty per cent or more." Commissions and profits are insured free from partial loss and from particular and general average, and against total loss only, and other profits and commissions are insured against total loss of vessel only. The Common Memorandum in use in England was introduced in 1749, and, under the form in use at Lloyds and the statutory form, certain articles are "warranted free from average unless general or the ship be stranded"; certain other articles are "warranted free from average under —— pounds per cent," and all other goods, also the ship and freight, are "warranted free from average under —— pounds per cent unless general or the ship be stranded." [88] Whatever

[87] Such as "insured only against general average and actual total loss," "insurers not to be liable hereunder for any constructive total loss on such articles if any portion thereof be delivered in specie at the port of destination," "free from average under — per cent unless general," "free from average unless general," "free from average on (specified articles) except general," "free from average on (specified articles) under — per cent," "free from all average on (specified articles) unless general or otherwise specially agreed," or in case of a policy on goods liable to heat, "in case of average — per cent on the sum insured shall be deducted from the average," "free from particular average," "no loss or average shall in any case be paid under — per cent," and various other clauses.

[88] 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 818, and form of policy 231, 232. "It was first introduced here about the year 1749, before which time the insurer was liable for every injury, however small, that happened to the thing insured. It was, therefore, thought better by such stipulation to free him from small partial losses than to compensate him for the extraordinary risk by adapting the premium to the nature of the commodity. This must in such case either have rendered the calculation of the premium a matter of much nicety or else have made the policy too complicated": 1 Marshall on Insurance, ed. 1810, *221, et seq. This author also says that in consequence of a decision in 1754 (Cartillon v. London Assur. Co., cited 3 Burr. 1553), whereby the words "or the ship be stranded" enabled the insurer to prove his whole partial loss on the

may have been originally intended in introducing the memorandum clause as to the recovery only of the surplus over the amount of percentage limited in case of loss, the practice is to hold the underwriters liable, in the absence of a contrary stipulation, for the whole amount of the loss, and not merely for the excess where the loss exceeds the rate of percentage specified.[89]

§ **2697. What Articles are Within the Clause.**—It may be shown by evidence whether certain articles are perishable in their own nature,[90] or whether certain articles belong to the class specified;[91] as that prunes are "fruit."[92] So usage of the trade may be important in determining what articles are justifiable in their own nature,[93] and the use of the words "all other articles perishable in their nature" will cover articles of that character not enumerated.[94]

§ **2698. Warranted Free from Average unless General.** The effect of the memorandum clause is not to enlarge the per-

ship being stranded. The London Assurance Company and the Royal Exchange Assurance Company, the two great companies, omitted the words "or the ship be stranded" (Id. *224). The London Assurance Company afterward inserted the clause. See Mason v. Sperry, reported in 1 Marshall on Insurance, ed. 1810, 226, per Lord Mansfield; Cocking v. Frazer, reported in 1 Marshall on Insurance, *227.

[89] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *871; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 838; 2 Phillips on Insurance, 3d ed., 477, 478, sec. 1791.

[90] Robinson v. Commonwealth Ins. Co., 3 Sum. (C. C.) 220; Nelson v. Louisiana Ins. Co., 17 Mart. (Pa.) 289; Coit v. Commercial Ins. Co., 7 Johns. (N. Y.) 385; Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202; Klett v. Delaware Ins. Co., 23 Pa. St. 262; Williams v. Cole, 16 Me. 207; Bakewell v. United Ins. Co., 2 Johns. Cas. (N. Y.) 246; Tudor v. New England Ins. Co., 3 Cush. (Mass.) 554.

[91] Moody v. Surridge, 2 Esp. 633; Astor v. Union Ins. Co., 7 Cow.(N. Y.) 202; Scott v. Bourdillion, 5 Bos. & P. 213

[92] De Pau v. Jones, 1 Brev. (S. C.) 437.

[93] Mason v. Sperry, reported in 1 Marshall on Insurance, ed. 1810, 226, per Lord Mansfield; Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 38, per Walworth, Ch. See Nelson v. Louisiana Ins. Co., 17 Mart. (La.) 289, and cases under first note under this section.

[94] Baker v. Ludlow, 2 Johns. (N. Y.) 289. "Corn, fish, salt fish, flour, and seed are warranted free from average unless general or the

ils insured against, but to exempt the underwriters from losses of a certain kind or within those perils.[95] Before the introduction of the memorandum clause the insurer was liable for every damage to the thing insured, and the object in inserting such a clause was probably to protect the insurers from losses from inherent decay, although its effect is to free the insurer from partial losses, subject to such exceptions as the clause stipulates. But all articles enumerated in the memorandum clause are not in all cases perishable in their nature, and the exception may be broad enough to include other losses, or to cover such articles as the parties may choose to insert. And in construing this clause and determining its effect consideration must be given to the meaning of the word "average," and also to the exact language of the memorandum stipulation, as well as to the understood interpretation of the clause at the present day.[96] The clause "free from average unless general"

ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent and all other goods; also the ship and freight are warranted free from average under three pounds per cent unless general or the ship be stranded": English form in use at Lloyds, Consolidated Stat. Ins. Law, 20 Vict. c. 23; 35 Geo. III, c. 63. "It is agreed that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel cutlery, hardware, and all other articles subject to rust, madder, sumac, willow and wicker ware (manufactured or otherwise,) salt, guano, cigars, (except in tin packages), fireworks, saltpeter, grain, and seeds of all kinds possessing the power of germination, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, jute and hemp bags, bagging, and articles used for bags or bagging, hops, pleasure carriages, household furniture, printed books, personal effects, paintings, statuary, engravings and prints, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature are hereby insured only against general average and actual total loss, and the insurers are not to be held liable hereunder for any constructive total loss on such articles, if any portion thereof be delivered": Form used by a San Francisco company.

[95] Potter v. Suffolk Ins. Co., 2 Sum. (C. C.) 197.

[96] See Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 38, per Walworth Ch.; Wilson v. Smith, 3 Burr. 1550, per Lord Mansfield; Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415, per Livingston, J.; Brooke v. La. State Ins. Co., 16 Mart. (La.) 644; 1 Marshall on Insurance, ed. 1810, *223, *231; Winting v. Independent Mut. Ins. Co., 15 Md. 297, per Bartol, J.

is, as to its effect, capable of two divisions: 1. A warranty to be free from average; 2. A warranty to be free from average unless general. In so far as it is a warranty to be "free from average," it covers only total losses arising from the perils of the sea and excludes partial losses. This principle is evidenced by all the cases, even those where the construction of other words used in this clause has been involved. Thus, Lord Mansfield declared in an early case that although the word "average" gave rise to an ambiguity,[97] as used in the clause, yet all partial losses were excluded and the insurer was not liable to any particular average.[98] In so far as the clause "free from average" is qualified by the words "unless general," the word "unless" means the same as "except," and the insurer is liable, under the clause "free from average unless general," for all losses where there is a general average, but all other partial losses are excluded by the clause.[99]

[97] See Wadsworth v. Pacific Ins. Co., 4 Wend. N. Y.) 33; Blays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415, per Livingston, J.

[98] Wilson v. Smith, 3 Burr. 1550, per Lord Mansfield. So Mr. Justice Butler declared in another case that from the first introduction of the clause the underwriter had never been held liable, except where there was a total loss of the articles: Cocking v. Frazier, reported in 1 Marshall on Insurance, ed. 1810, *228. Lord Kenyon declared in 1793 that there could not be a recovery for a partial loss where there had been no stranding, where the words "or the ship be stranded" were also used: Andrews v. Vaughan, reported in 1 Marshall on Insurance, ed. 1810, *233. So Lord Alvanley and Mr. Justice Chambre in another declare that the underwriter is not liable for partial losses: Dyson v. Rowcroft, 3 Bos. & P. 474. See, also, Bargett v. Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385; Wilson v. Royal Exch. Ins. Co., 2 Camp. 623; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Reimer v. Ringrose, 6 Exch. 263; 20 L. J. Ex. 175; Morean v. United States Ins. Co., 3 Wash. (C. C.) 256; 1 Wheat. (U. S.) 219; Manning v. Newham, 2 Camp. 624; 3 Doug. 130; Williams v. Kennebec Ins. Co., 31 Me. 455; Skinner v. Western M. & F. Ins. Co., 19 La. 273.

[99] The words "free from average unless general" are understood to be convertible with "total loss": Bryan v. New York Ins. Co., 25 Wend. (N. Y.) 617, per Nelson, J.; Aranzamendi v. Louisiana Ins. Co., 2 La. 432; 22 Am. Dec. 136. "The insurer is liable for all losses arising . . . . where there is a general average, but all other partial losses are excluded by the terms of the policy; the word 'unless' means the same as except . . . . and is not to be construed as a condition, ... and the words 'free from average unless general'

§ 2699. **"Or the Ship be Stranded."**—This clause exists under the English form of policy and Lloyds policy under the common memorandum covering "all other goods, also the ship and freight." It also exists in numerous cases under policies in this country, sometimes as a part of the memorandum itself, and in other cases being contained in the body of the policy. In some instances the liability for a loss or damage existing only when occasioned by stranding, in others unless the vessel be stranded, or "unless occasioned by stranding." This clause was held in 1754 to be a condition, and upon the ship's being stranded the insured was let in to prove his whole partial loss.[100] Again, in 1790, Lord Kenyon declared that the stranding of the ship put the memorandum "in the same situation as any other commodity not mentioned in the memorandum, and the underwriters are liable for all damages sustained by it; for otherwise there would be a very considerable difficulty in ascertaining how much of the loss arose from the perils insured against, and how much from the perishable nature of the commodity, which was the very thing the memorandum was intended to prevent." [101] The same eminent authority, two years later, said that "when a ship is stranded then the underwriters agree to ascribe the loss to the stranding as being the most probable occasion of the damage." [102] In a

could never mean to leave the insurer liable to any particular average": Wilson v. Smith, 3 Burr. 1550, per Lord Mansfield. "It is well understood at the present day with respect to such articles that underwriters are free from all partial losses of every kind which do not arise from a contribution toward general average": Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415, per Livingston, J. See further De Pau v. Jones, 1 Brev. (S. C.) 437; Insurance Co. v. Bland, 9 Dana (Ky.), 143; Humphreys v. Union Ins. Co., 3 Mason (C. C.), 429; Maggrath v. Church, 1 Caines (N. Y.), 196; 2 Am. Dec. 173; Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 33; Edgar Thompson Steel Co. v. Boylston Mut. Ins. Co., 4 Mo. App. 224; Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415; Hernandez v. New York Mut. Ins. Co., 6 Blatchf. (C. C.) 326; Hedburg v. Pearson, 7 Taunt. 154; Holt N. P. 349; Gould v. Louisiana Mut. Ins. Co., 20 La. Ann. 259; Great Indian Peninsular Ry. Co. v. Saunders, 30 L. J. Q. B. 218; 1 Best & S. 41; affirming 2 Best & S. 266; 31 L. J. Q. B. 206.

[100] Cantillon v. London Assur. Co., 3 Burr. 1553.

[101] Bowring v. Elmslie, cited 7 Term Rep. 216.

[102] Nesbit v. Lushington, 4 Term Rep. 783.

subsequent case before the court of King's Bench he affirms the doctrine of the decision of 1754, as well as that of the two succeeding cases above noted, and declares that if the ship be stranded, that destroys the exception, and lets in the general words of the policy, and it is also held that in case of stranding the insurer is liable for any partial loss sustained by any of the articles covered by the clause, even though the loss did not arise from the stranding, but solely from some other cause.[103] In this last case the ship struck on a sunken rock, and her planks being started the water flowed into the hold and over the cargo, and the ship was run on shore, where the water flowed in and over part of the cargo, but she was, however, able to proceed on her voyage, and arrived at her destination with the greater part of her cargo, although very much damaged, a small part having been left as entirely unfit for use. Neither the ship nor cargo received the damage in consequence of the stranding, but solely on account of striking on the rock, and if there had been no stranding, both the ship and cargo would have been totally lost. Part of the damage to the cargo happened after the stranding, and it was said that if no damage whatever were occasioned by the stranding, yet if the ship thereafter encountered bad weather and the cargo sustained an average loss, the insurers would have been liable, and, as will be noted, the stranding occurred while the memorandum articles were at risk, but if the risk had then terminated, the rule could not well apply.[104] It is apparent, therefore, from the above cases that the clause "free from average unless general or the ship be stranded" excludes a recovery for partial or particular average loss where there is no stranding, and, as appears from the preceding section, there may be a recovery for a general average loss, and as the clause in question is now generally construed the rule stated under the first three cases under this section seems to prevail, and where the ship is stranded the insurers are liable, as to the

[103] Burnett v. Kensington, 7 Term Rep. 210; Esp. 416. See, also, opinions of Mr. Justice Ashurst, Mr. Justice Lawrence, and Mr. Justice Gross in this case.

[104] Roux v. Salvador, 1 Bing. N. C. 536; 3 Bing. N. C. 276, per Lord Abinger.

articles covered for any average loss, to the same extent as if there had been no clause "free from average," and this is so even though the loss cannot be ascribed to the stranding, but proceeds solely from some other peril happening prior or subsequently to the stranding, provided the risk on the articles covered has not terminated at the time of the stranding. Another exception as to the liability for particular average in cases where a per cent limit is fixed will be noted hereafter.[105] If a policy contains the words "free of particular average unless the vessel be sunk, burned, stranded, or in collision," and a collision occurs, the exception is destroyed, and ceases to operate from that moment, and subsequent losses must be borne by the underwriter, whether resulting from the collision or

[105] The above are also substantially the conclusions stated by Mr. Arnould, Mr. Maclachlan, Mr. Marshall, Mr. Phillips, and Mr. Parsons. "If the ship be stranded, the underwriters agree to be responsible for any loss by sea damage on the enumerated articles, however trifling the extent of the deterioration may be, just as though no warranty to be free from average had been inserted in the policy"; and again "the underwriter is liable for no particular average losses, or for none under the rates specified, unless the ship be stranded. But if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist": 1 Arnould on Marine Insurance, Perkins' ed. 1850, *857, *860; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 821-23. "It is now settled that if the ship be stranded the insurer is liable for any partial loss on any of the articles, though it did not arise from the stranding, but from some other cause": 1 Marshall on Insurance, ed. 1810, *234. "The doctrine adopted in England appears to be that after a stranding the construction of the policy is the same in respect to all losses on goods on board at the time of the stranding, whether happening before or after the stranding, as if it had not contained this exception. . . . . A stranding does not let in a claim for a loss that took place previously on goods that had been landed before the stranding. In Great Britain and in the United States, the insurers are, in the common form of the policy, generally I believe without exception liable for general averages of however small amount": 1 Phillips on Insurance, 3d ed., 448, 449, secs. 1761-63. Mr. Parsons states substantially the above rules, but as to the rule that regards the insertion of the condition "unless," he says the construction is now well settled, but we do not think that it rests on good grounds": 1 Parsons on Marine Insurance, ed. 1868, 630, 631.

not.[106] If slight fires occur in the coal in the bunkers of an iron ship, which are put out by pumping water on the coal and some injury is done by the heat to the ship's plating and otherwise, the ship is not "burnt" within the meaning of that term as used in the memorandum in the policy.[107]

§ 2700. Warranted "Free from Average under —— Per Cent unless General" and Like Clauses.—The memorandum clause frequently contains a stipulation to be "free from average under" a specified "per cent unless general," or the policy may contain a clause covering other than memorandum articles, whereby it is stipulated to be "free from particular general average less than" a certain per cent, or not to be liable for a partial loss on enumerated articles unless it amounts to a certain per cent on the aggregate value, and happens by stranding, or "free from particular average and partial loss," and free from loss or damage only when occasioned by stranding, etc., and amounting to a specified per cent or more, and various other forms of substantially the same character. In construing these clauses reference must be had in all cases to the words used as evidencing the intent of the parties. Thus, the character of the terms may be such as to operate as a limitation of all kinds of averages. Thus, where the stipulation was free from average under ten per cent, it was held to exclude certain extraordinary charges and damages under that per cent, although in the nature of general average.[108] So where the clause was "free from average under seven per cent unless general," it was held that there could be no recovery except for an actual total loss or a general average.[109] So in

[106] London Assurance v. Companhia De Moagens Do Barreiro, 15 U. S. C. C. A. 379; 68 Fed. Rep. 247, affirming 56 Fed. Rep. 44.

[107] The Glenlivet, L. R. P. D. (1893), 164; L. R. P. D. (1894) 48, cited as above in London Assurance v. Companhia De Moagens Do Barreiro, 15 U. S. C. C. A. 379, 384, per Acheson, Cir. J.; 68 Fed. Rep. 247.

[108] Coster v. Phœnix Ins. Co., 2 Wash. (C. C.) 51.

[109] Le Roy v. Gouverneur, 1 Johns. Cas. (N. Y.) 226. It will be observed that the word "actual" total loss is used; there is, however, a question whether there must be a constructive total loss in such cases.

case of an insurance on a steamer warranted "free from average under fifteen per cent unless general," the policy being valued, there can be no recovery for damages under the stipulated per cent;[110] nor for expenses "for repairs under the specified per cent of the valuation where the insurer is not to be liable "for any partial loss on vessel or freight under ten per cent, excepting in all cases general average."[111] If the stipulation was not to be liable "for the expense of docking or hauling out for repairs, nor for any loss except in cases of general average, unless the necessary repairs required solely by the disaster, shall amount to ten per cent of the agreed value of the policy," the docking and hauling out for repairs must be required solely by the disaster, and must not be under ten per cent of the agreed value to warrant a recovery.[112]

§ 2701. Unless It amounts to —— Per Cent and Happens by Stranding.—If the policy provides that insurers shall not be liable for "partial loss on salt, grain, etc., unless it amounts to seven per cent on the whole aggregate value of such articles and happens by stranding," the company is not liable for a partial loss on such articles, unless occasioned by the stranding of the vessel.[113] But where there was a stipulation not to be liable "for any partial loss on goods esteemed perishable in their nature unless it amounts to seven per cent . . . . and happens by stranding," and the policy, however, insured against perils of the sea by which the articles were lost, and not by stranding, the insurers were held liable.[114] So in another case, the insurance was upon freight valued stipulated not to be liable for any partial loss on certain enumerated articles or other goods perishable in their nature, "unless it amounts to seven per cent and happens by stranding,

[110] Riley v. Ocean Ins. Co., 11 Rob. (La.) 255.

[111] Paddleford v. Boardman, 4 Mass. 548; Ken v. Quaker City Ins. Co., 33 Mo. 158; Wallace v. Ohio Ins. Co., 4 Ohio, 234; Perry v. Ohio Ins. Co., 3 Ohio, 305.

[112] Snapp v. Fireman's Ins. Co., 2 Handy (Ohio), 252.

[113] Leake v. Columbus Ins. Co., 13 Ohio, 48; 42 Am. Dec. 188.

[114] Williams v. Cole, 16 Me. 207.

not for partial loss on . . . . vessel or freight unless it amounts to five per cent," and it was held that a loss of freight over five per cent was recoverable, although there was no stranding, and the cargo consisted of perishable articles.[115]

§ 2702. Exception of "Loss or Average" under Specified Per Cent—Expense of Repairs.—If there is an exception of "loss or average" under a specified per cent on the agreed value of the policy, it is held that the expense of repairs must be ascertained by deducting one-third new for old, and if the net loss thus arrived at is under the stipulated per cent of the agreed value, there can be no recovery.[116]

§ 2703. Percentage—Aggregate of Losses in Case of Collision.—In a comparatively recent case in Massachusetts the policy provided against liability for partial loss "on vessel and freight unless it amounts to seven per cent," and a clause was attached to the margin of the policy whereby risk by collision was covered "according to the decisions of the supreme court of Massachusetts prior to 1853, provided that the company shall not in any case be liable for a greater sum than the amount insured by this policy," and it was held that a loss subsequent upon collision through the vessel's own fault, by reason of which the owner was obliged to pay damages to the owner of the other vessel, was not recoverable from the insurers, as it did not amount to seven per cent of the vessel's value.[117] It is declared that if the policy stipulates against liability for partial loss on the ship under five per cent, and by reason of a collision, without fault on either side, a sum is apportioned on the vessel insured on account of injury to the other vessel, and said sum is paid under decree of a foreign court, to the operation of whose laws the vessel is subjected at the time, and said sum so apportioned and paid, together with the vessel's own loss, exceeds five per cent, the insurers are liable for the whole amount, for the loss by the collision is

[115] Lord v. Neptune Ins. Co., 10 Gray (Mass.), 109.

[116] Keir v. Quaker City Ins. Co., 33 Mo. 158; Wallace v. Ohio Ins. Co., 4 Ohio, 234; Perry v. Ohio Ins. Co., 5 Ohio, 305.

[117] Whorf v. Equitable M. Ins. Co., 144 Mass. 68; 10 N. E. Rep. 513; Wallace v. Ohio Ins. Co., 4 Ohio, 234. See preceding section.

an entirety, and the items are not to be separated.[118] This rule, however, involves the discussion of other principles, and the case upon which it is based and principles discussed will be more fully considered hereafter.

§ 2704. Value Only of Cargo at Risk and not of Whole Cargo Forms Basis of Percentage.—If part of the cargo is delivered at the port of destination and a loss is sustained upon the balance thereof during the progress of a regular delivery or discharge, the insurer is liable if the loss amounts to more than the specified per cent of the value of the cargo then at risk, although the amount of the particular loss does not reach the specified per cent on the whole value of the cargo shipped,[119] and the same principle governs the case where the complete cargo is not on board, for the percentage is then also estimated of the amount of cargo then at risk, and not on the value of the whole cargo to be shipped.[120] But it is held that a total loss cannot take place after a part of the goods are safely discharged. Thus, it was decided that the insurers were not liable for the loss where a hundred barrels of potatoes out of sixteen hundred had been landed at the destination, and the balance on board was lost by the boat's sinking, the insurance being against total loss "free from average unless general" and "free from particular average." [121]

§ 2705. "Each Package Subject to Its Own Average" and Similar Clauses—Separately Valued.—If the policy contains a clause providing that each package shall be subject to its own average, this does not apply where the risk is upon cargo in bulk and not in packages. Thus, where the risk was described as "thirty-nine thousand eighty-five bushels bulk at

[118] Peters v. Warren Ins. Co., 1 Story (C. C.), 463; 3 Sum. (C. C.) 389; affirmed, 14 Pet. (U. S.) 99.

[119] Maryland Ins. Co. v. Bosley, 9 Gill & J. (Md.) 337. But see Gracie v. Maryland Ins. Co., 8 Cranch (U. S.), 84; Moreau v. United States Ins. Co., 1 Wheat. (U. S.) 219, per Washington, J.

[120] Rohl v. Pan, 1 Esp. 445.

[121] Chadsey v. Guion, 16 Jones & S. (48 N. Y. Supr. Ct.) 267; 97 N. Y. 333; Gracie v. Maryland Ins. Co., 8 Cranch (U. S.), 84.

one dollar and fifteen cents per bushel, sum forty-four thousand nine hundred and forty-five dollars, rate one per cent, premium four hundred and forty-nine dollars and forty-five cents," it was held that the clause did not apply, and that in determining the percentage of partial loss the proportion between the entire actual loss and the value of the entire shipment must be ascertained;[122] but if such a clause or a similar one is used, and the goods are shipped in separate packages separately valued, or it otherwise clearly appears that it is intended that each package be separately insured, or it clearly appears that it is intended to pay an average on each package, as if separate interests were separately insured, the underwriter is liable for a loss on each package to the extent of the per cent stipulated.[123] So where the hull and machinery were separately valued, and it was stipulated "average payable on the whole or on each, as if separately insured, warranted free from particular average under three per cent," and an expense was incurred in saving both from a total loss by fire, it was held that it should be apportioned against each subject insured separately, inasmuch as the insurance was in effect a separate one on each, but if by adding these together the claim did not amount to the limitation, there could be no recovery.[124]

§ **2706. "Average Recoverable on Each Package Separately or on the Whole."**—In an English case two policies were issued on galvanized iron, "average recoverable on each package separately or on the whole." The insurance was "at and from warehouses at Bristol to London," and covered all risks in transit "until safely delivered on board export vessels, if so forwarded." The cargo was to be carried to the Thames and there delivered to the plaintiffs into barges, to be supplied

[122] Haenshen v. Franklin Ins. Co., 67 Mo. 156; Benecke's Principles of Indemnities, 478 and note.

[123] Stevens on Average, 5th ed. 220-26; 2 Arnould on Marine Insurance, Perkins' ed. 1850, *869; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 836.

[124] Oppenheim v. Fry, 3 Best & S. 873; affirmed, 5 Best & S. 348; 33 L. J. Q. B. 267.

them, and plaintiffs were to take the iron to another ship to be carried to Australia. There were thus two parts to the voyage for which the goods were insured. Part of the goods were damaged by perils insured against upon her arrival in the Thames. On arrival assured took the goods into their own control, noticed the damage, and the goods were landed to ascertain what packages contained iron that was damaged and the extent thereof. The underwriters were notified, but declined responsibility for undamaged goods, although they appointed a surveyor to attend to the examination on their behalf. The damaged and undamaged packages were separated, the former sold, and the remainder treated as undamaged goods, and shipped to Australia. The assured having thus elected to treat the insurance as being on each package, they claimed, in respect to those containing the damaged iron, the difference between the invoice price and the net sum resulting from the sale, which claim was allowed, as was also the cost incurred in respect to said packages. Assured also made the additional claim for costs incurred by reason of the unloading and examination, and it was held that the underwriters were not liable, in respect to the expenses incurred, in relation to any part of the cargo other than those cases which contained the damaged iron. Lord Esher, M. R., says: "They must put their claim in one of two ways. One way is to say that the undamaged goods were made of less value because of the damage to the other packages, because thereby they had lost their character, and would not sell for so much in the market. If they put their claim in this way, the answer is that it is contrary to the rules of insurance. The only other way to support the claim is to treat it as part of the damage to the damaged portion of the goods. As to this it is enough to say that it is impossible to make out how the damage to one part of the goods can be affected by an examination of the other part. What the assured did was no doubt a reasonable thing to do in their own interest, but they cannot throw the cost of doing it on the underwriters. In Stevens on Average, in part 1, section 3, article 10, it is pointed out that the underwriter engages to guarantee the assured against the direct operation of sea

damage, and not against the consequential results; and the highest that could be said of the claim in this case is that it was in respect of damage which was a consequential result of the sea peril, and it is very doubtful if that could be justly said. The evidence which was given at the trial as to the practice of average adjusters in such cases shows that what was done in this case was in accordance with the practice, so that authority and practice are both against the plaintiff. As to the other arguments in support of the plaintiff's case it is quite impossible to say that what was done here was to save loss to the underwriters, and I think I ought to say also that it is clear that the insurance was on the iron, so that no claim could arise in respect to damaged packing cases." It was also said in an earlier part of the opinion: "I incline to think, though I do not think it material to our decision, that this was an insurance on the whole cargo, and not on separate packages." [125]

§ 2707. **Effect of Separate Valuation of Each Package, etc.—When there is and when not an Insurance on Each Separate Package, etc.**—The point of separate valuation of packages, parcels, bales, etc., of the same kind of goods is one concerning which there is a want of unanimity in the authorities as to insurance, under the clauses excepting losses under a specified per cent, and where the policy covers total loss only. We believe, however, that the following rules are fairly deducible from the authorities: If goods of the same kind are specifically invoiced and insured, or it clearly appears that the insurance covers specifically packages, bales, boxes, bushels, or other separate division valued and insured by such package, etc., or by number of packages in parcels, being a specific part or division of the whole, there may be a recovery of a total loss of each parcel, etc., and the rule also applies in case each article so separately valued clearly intended to be separately insured sustains a loss equal to the specified per cent of its value under the percentage clause.[126] It

[125] Lysaght Limited v. Coleman (1895), 1 L. R. Q. B. D. 49.

[126] Kettle v. Alliance Ins. Co., 10 Gray (Mass.), 144; Haenshen v. Franklin Ins. Co., 67 Mo. 156. Examine Blays v. Chesapeake Ins.

would seem, however, that the fact alone of a separate valuation of specific bales, packages, etc., is not sufficient where it is not the obvious intent of the policy to effect a separate insurance on each package, parcel, etc., as a distinct basis on which to compute the rate of exception; at least it is declared that although each parcel, bale, package, or box of an article is separately valued, this is not of itself a separate insurance on each parcel, bale, or package. Thus, in case of an invoice of one hundred and four bales of cotton at a separate valuation per bale, and a stiplation that "no loss or average shall in any case be paid under five per cent unless general," a total loss of four bales will not entitle assured to recover anything from the insurers.[127] It is obvious, however, that the main difficulty exists in ascertaining the intention of the parties. It would seem that a separate valuation ought to afford some evidence of such intent, yet if the express clauses

Co., 7 Cranch (U. S.), 415; Gracie v. Maryland Ins. Co., 8 Cranch (U. S.), 84; Humphrey v. Union Ins. Co., 3 Mason (C. C.), 429, per Story, J.; Guerlain v. Col. Ins. Co., 7 Johns. (N. Y.) 527; Morean v. United Ins. Co., 1 Wheat. (U. S.) 219; Louisville M. Ins. Co. v. Bland, 9 Dana (Ky.), 148.

[127] Newlin v. North American Ins. Co., 20 Pa. St. 312; 5 Pa. L. J. 116. In a New York case the court says: "The various fallacies by which a contract such as the present has been construed as intended to cover a total loss of a part of the insured subject, when it was shipped in separate boxes or packages and valued separately, have now been rejected by the courts of the principal maritime countries"; but here the cargo was one thousand six hundred and fifty barrels of potatoes shipped in bulk, the adventure to continue until said goods and merchandise should be safely landed at the port of destination, and the contract here was upon the subject of insurance as an entirety, and such was evidently the intent of the parties: Chadsey v. Guion, 97 N. Y. 333. And this case is cited in another decision where an insurance was effected, "$14,300 on 6,000 boxes of lemons free of particular average, but liable for loss of part by jettison . . . . lemons valued at 4.25 gold per box." The construction of other clauses and the question of repugnancy between printed and written clauses was involved, but, upon the point before us, the court held that this was not an insurance upon each box of lemons at the sum valued per box, but an entire single contract on the whole number of boxes, and that there must be a total loss of the whole or a loss of part by jettison: Hernandez v. Sun Mut. Ins. Co., 6 Blatchf. (C. C.) 317.

used and the whole policy clearly show that notwithstanding the separate valuation it was not intended that there should be, in effect, such an insurance as that the separate packages, parcels, etc., should afford a distinct basis on which to estimate the loss or complete the rate of exception, then the policy will be given that construction. Notwithstanding the above rules may be open to discussion in view of the authorities, nevertheless the rule is settled that in the absence of any indication in the policy, by separate valuation or otherwise, of an intent that each parcel, bale, or package shall form the basis of a separate adjustment of the loss, and except for general average there can be no recovery for a total loss or destruction of a part only of the particular species, even though distinct parcels, packages, or bales be lost by the specified perils, and this is so whether the particular article be shipped in bulk or separate packages, boxes, or parcels.[128] The English rule is thus stated: "Where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed, by distinct valuation or otherwise, in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and though such package or packages be entirely destroyed or otherwise lost by the specified perils." [129]

[128] Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 33; Chadsey v. Guion, 97 N. Y. 333; Humphrey v. Union Ins. Co., 3 Mason (C. C.), 429; Poole v. Protection Ins. Co., 14 Conn. 47; Haenshen v. Franklin Ins. Co., 67 Mo. 156; Waln v. Thompson, 9 Serg. & R. (Pa.) 115; Gracie v. Maryland Ins. Co., 8 Cranch (U. S.), 84; Louisville M. Ins. Co. v. Bland, 9 Dana (Ky.), 148; Brooke v. Louisiana S. Ins. Co., 17 Mart. (La.) 530; 16 Mart. (La.) 681.

[129] Ralli v. Johnson, 6 El. & B. 422; 25 L. J. Q. B. 300; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1016; overruling Davy v. Milford, 15 East, 559, "so far as the judgment in that case was against the underwriters, the opinion of Gibbs, C. J., in Hedburg v. Pearson, 7 Taunt. 152, and the dicta of Abbott and Holroyd, JJ. in Cologan v. London Ins. Co., 5 Maule & S. 456"; Id. note. It is well, however, to compare this rule with that stated by Mr. Arnould and restated by Mr. Maclachlan, where it is said: "If a cargo is made up of separate packages capable of a distinct valuation in the outset,

§ 2708. Where Articles of Different Kinds are Each Separately Valued.—If there are articles of different kinds, each class or kind separately valued, and there is a damage on one of the articles in excess of its valuation, a recovery may be had for a total loss on the whole of that particular article or class.[130] Or if the loss on such particular article or class so separately valued equals as to its value the specified percentage, there may be a recovery.[131]

§ 2709. Where Percentage is Fixed for Each Particular Class or Impliedly Fixed upon Each Enumerated Article.—It is held that if certain specific articles belong-

and the insurance appears from the terms of the policy to be separately effected on each distinct package, there can be no doubt that the loss will be treated as a total loss on each package lost": 2 Arnould on Marine Insurance, Perkins' ed. 1850, *1038; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1018; citing Hills v. London Assur. Co., 5 Maule & S., 567, per Lord Abinger; Louis v. Rucker, 3 Burr. 1176, per Lord Mansfield; and also, as illustrating the rule, the cases noted by Mr. Maclachlan and mentioned in the preceding note herein. Mr. Phillips thus states the rule: "Where an insurance is made free from average indiscriminately upon an article, without any provision in the policy indicating that a loss is to be adjusted on the different bales or packages or parcels separately, the assured cannot recover for a total loss on account of the destruction of a part of the insured shipment of articles of the same description": 2 Phillips on Insurance, 3d ed., 459, 462, sec. 1773, reviewing and citing many English and American cases. Mr. Parsons says: "In England the law seems to be that if the packages are separately valued the insured can recover for all that are totally lost, but not otherwise. It has been said that the rule is the same in this country, but we are not aware of any decision to that effect." In a note he says: "Whatever the law may be where each parcel is separately valued, it is certain in this country, where this is not the case, there can be no total loss of part": 1 Parsons on Marine Insurance, ed. 1868, 637, 638, n.

[130] Deiderick v. Commercial Ins. Co., 10 Johns. (N. Y.) 234. In this case an abandonment was made of the particular article, which was sugar, separately valued, and it was held valid. Mr. Phillips, however, denies that an abandonment can be made in such a case: 2 Phillips on Insurance, 3d ed., 360, 361, sec. 1661. See chapter herein on abandonment.

[131] Ocean Ins. Co. v. Carrington, 3 Conn. 357. See Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73; 2 Phillips on Insurance, 3d ed., 475, sec. 1788.

ing to different classes are insured warranted free from average, and the policy fixes a standard or rate percentage for each of the several classes, as fifteen per cent for one class and ten per cent for another class, etc., and the loss upon the articles of the particular class equals the rate fixed for that class, the insurer is liable, although otherwise where it does not equal the rate specified in the class.[132] If certain specifically enumerated articles, as in case of hides, flax, etc., under the memorandum clause, are insured in gross under the percentage exception, such clause applies to each specified article separately the same as if it immediately preceded the article enumerated, and if the loss on such article equals the specified rate per cent excepted, the underwriters are liable, and the same rule applies to an exception of partial loss in memorandum articles specifically enumerated. Thus, it is declared, "when the cargo consists of several distinct species or kinds of articles, all of which are embraced in the memorandum, each forms a separate class or thing, and the exception is to be applied to each separately, considered as an independent subject of insurance. . . . . The construction of the policy is the same as if there were a special exception of each article by itself from partial loss, instead of grouping them together in one clause." It is suggested, however, by the same court that this might not be the true interpretation if the exception were in general terms of all perishable goods; but the court adds: "It certainly is the only reasonable one where the articles are specifically named."[133] But where the policy provided that "the company shall not be liable for any partial loss on bar or sheet iron, iron wire, hoop iron, etc., grains of all kinds, etc., nor for any partial loss on hemp or flax unless the same shall amount to twenty per cent on the whole aggregate value thereof," it

[132] Louisville M. & F. Ins. Co. v. Bland, 9 Dana (Ky.), 143; Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73, per the court. See Hall v. Rising Sun Mut. Ins. Co., 1 Disney (Ohio), 308.

[133] Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73; 2 Arnould on Marine Insurance, Perkins' ed. 1850, *870; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 835; citing Stevens on Average, 5th ed. 223.

was held the insurer was exempted from any partial loss on bar iron, though the same exceeded twenty per cent.[134]

§ 2710. Where Insurance is upon Cargo in Bulk—General Designation of "All Other Goods"—Goods of Distinct Kinds under One General Designation.—It is well settled that if the insurance be upon the cargo in bulk, valued in bulk, and the policy not upon packages, parcels, bales, etc., the insurers are not liable for a total loss of part under a clause free from average. In such a case there is only an average loss on the whole.[135] In case of goods not specifically enumerated under the memorandum clause but designated generally as "all other goods" or the like, they constitute a mass of property separate and distinct from specifically enumerated articles, and their aggregate value forms the basis upon which the percentage fixed by the exception must be calculated, and to which aggregated mass the general exception applies, unless there be a specific exception of percentage applied to "all other goods" and the like, as an aggregate, in which case the loss is computed with reference to the exception specifically applicable.[136] Cases of the last character differ from those where goods which have no natural or artifical connection with each other, but are several separate articles essentially different in value, nature, kind, intended use, and manner of disposal on board, are insured under some general designation intended to include them all, and indicating their miscellaneous distinct character, such as "master's effects," or "any goods" of an emigrant, there being a clause "free from all average." Here the goods are not massed together to the extent of excluding a total loss of less than the whole, but the insur-

[134] Evans v. Commercial Ins. Co., 6 R. I. 147.

[135] Haenshen v. Franklin Ins. Co., 67 Mo. 156; Hills v. London Assur. Co., 5 Mees. & W. 569, per Lord Abinger; Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 33, per Walsworth, Ch. See Humphrey v. Union Ins. Co., 3 Mason (C. C.), 429, per Story, J.; Poole v. Protection Ins. Co., 14 Conn. 47.

[136] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *868; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 835, 836; 2 Phillips on Insurance, 3d ed., 473, sec. 1786; Stevens on Average, 5th ed., 223.

ance is upon the several distinct articles, and insurers are liable for a total loss of any specific thing.[137]

§ 2711. The Question of Addition of Successive Losses to Reach the Limitation—Cases.—Under a policy on a ship providing that the insurers should not be liable for a partial loss under five per cent it is held in Massachusetts that successive partial losses occurring upon different passages by distinct storms or gales cannot be aggregated to reach the five per cent limitation, and that assured has the burden of proving, in case of two several disasters, that there was a partial loss amounting to five per cent from one gale or disaster.[138] The doctrine of this case is but the affirmance of a decision rendered in the same state nearly half a century prior thereto, under a voyage policy on the ship providing against liability for a particular average, unless it amounted to five per cent, and the vessel sustained damage in a gale and several months thereafter by collision with another vessel, it being held that the two losses could not be aggregated.[139] And both these decisions are followed in a Maine case in a policy upon the ship against partial loss under the same percentage.[140] Mr. Justice Story, however, while declaring no rule as to the ship, suggests the impracticability of ascertaining the injury to the ship by successive gales, especially where there has been great straining until she has been overhauled in port, and says in effect that he cannot see how the words should receive a different construction as to the ship and cargo.[141] In an English case a time policy on a ship provided, "The ship and freight shall be and are warranted free from average under three pounds per cent, unless general or the ship be stranded, sunk, or burnt." A loss was incurred on two successive voyages during the currency of the policy, although the loss on each particular voy-

[137] Duff v. MacKensie, 3 Com. B., N. S., 16; 26 L. J. C. P. 313; 3 Jur., N. S., 1025; Wilkinson v. Hyde, 3 Com. B., N. S., 30; 27 L. J. C. P. 116; 4 Jur., N. S., 482.

[138] Paddock v. Commercial Ins. Co., 104 Mass. 521.

[139] Brooks v. Oriental Ins. Co., 7 Pick (Mass.) 259.

[140] Hagar v. New England Mut. Ins. Co., 59 Me. 460.

[141] Donnell v. Columbian Ins. Co., 2 Sum. (C. C.) 366, per Story, J.

age was under the specified rate per cent, but total loss added together exceeded three pounds per cent. It was held that the losses might be lumped together to reach the limited per cent so far as the voyages, though consisting of several passages, constituted an entire, distinct, and separate voyage.[142] Under another decision, the case being that of a voyage policy on the ship "free from average under three per cent unless general," distinct losses arising at different times were added together to reach the limitation.[143] As will be noted, the above cases were those of insurances upon the ship both under voyage and time policies. In another case, however, the stipulation provided against liability for any partial loss on goods, vessel, or freight under five per cent, "exclusive in each case," of all charges and expenses incurred for the purpose of ascertaining and proving the loss, and it was declared by Mr. Justice Story that successive losses on the cargo in the course of the voyage could be aggregated to reach the rate per cent limited, and also that the words "in each case" referred to the three separate subjects of insurance—goods, vessel, and freight.[144]

§ 2712. Same Subject—Conclusion.—In considering this question the main division is that of insurances upon cargo and freight and upon the ship. As to the ship, the division of voyage and time policies exists, and under the latter the point is presented of separate and distinct voyages during the continuance of the risk and of an entire voyage, although consisting of several passages. As to goods and freight, the rule permits the aggregation of successive averages occurring on the voyage, passage, or period during the continuance of the risk on that subject insured. It is clearly evident, however, from an examination of all the cases above noted by us that they are conflicting so far as the ship is concerned, and if only the decisions in this country are considered, we have the Mas-

[142] Stewart v. Merchants' M. Ins. Co., 16 Q. B. D. 625; 14 Q. B. D. 555.

[143] Blackett v. Royal Exch. Assur. Co., 2 Tyrw. 266; 2 Cromp. & J. 244.

[144] Donnell v. Columbian Ins. Co., 2 Sum. (C. C.) 366; Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 267, per Putnam, J.

sachusetts and Maine cases directly asserting a doctrine against the aggregation of successive partial losses occurring upon different passages by distinct storms or gales, while opposed thereto is the opinion of that eminent jurist, Mr. Justice Story; although this is somewhat weakened by the fact that, in his argument, he asserts that he is both for and against the addition of successive losses, and also by his declaration that he would be inclined to adopt the decision in the earlier Massachusetts case were it not that the case before him related only to the cargo.[145] Again, in England the result of the most recent case, as deduced by Mr. Maclachlan,[145a] is in conflict with

[145] Donnell v. Columbian Ins. Co., 2 Sum. (C. C.) 366, per Story, J.

[145a] *Opinions of Text-writers.*—Mr. Parsons is of the opinion that successive losses may be added, and that "the weight both of reason and authority lead to the conclusion," although he qualifies this statement by adding: "A distinction in this respect may exist between the ship and the cargo, because it is said that the damage done to the ship at different times may be more easily discriminated than the damage to the cargo, which can only be discovered at the end of the voyage": 1 Parsons on Marine Insurance, ed. 1868, 635. Mr. Phillips says: "In regard to the cargo and freight, the practice of adjustments has always been to estimate the rate of the exception upon the aggregate loss of each passage or period during which the risk continues on the same subject"; and he adds: "The weight of authority leads to the conclusion that the exception applies to the aggregate of successive losses on the ship in the same manner as on the cargo": 2 Phillips on Insurance, 3d ed., 468, sec. 1780. So Mr. Arnould is of opinion that there never has been any doubt as to the freight and goods, "that the true rule is to take the aggregate amount of the whole damage occasioned in the course of the voyage; . . . . that the rule is the same with regard to the ship, also": 2 Arnould on Marine Insurance, Perkins' ed. 1850, *866. Mr. Maclachlan exhaustively considers the question, noting and comparing four of the cases considered under the last section. (Stewart v. Merchants' M. Ins. Co., 16 Q. B. D. 619; Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259; Donnell v. Columbian Ins. Co., 2 Sum. (C. C.) 366; Blackett v. Royal Exch. Assur. Co., 2 Cromp & J. 250). And in this connection he exhaustively discusses the use and meaning of the term "average," and says: "The root of all this difference and error is to be found in the term 'average' erroneously viewed as a general term *nomen generale*. . . . . The use of this term differs in different countries," and that "in England the use of it has always been one precise and definite meaning," and he concludes that the result of the last decision in England (Stewart v. Merchants' M. Ins. Co., 16 Q. B. D. 619) "is that the purposes of the three and five per cent clauses of

the Massachusetts and Maine cases, but is in line with the intimation of Mr. Justice Story, favoring the aggregation of successive losses, but it qualifies that suggestion or opinion so far as time policies are concerned; and the same qualification, so far as this English case has any weight here, extends to Mr. Phillips' rule[145b] and also so much of Mr. Parsons' rule as has any positive force.[145c] It will be noted, however, although Mr. Parsons' opinion as first stated by him is positive enough, yet he immediately thereafter adds a qualifying clause, the effect of which is to take away the force of the preceding opinion and to leave no rule whatever stated as to the ship. With reference, however, to the conclusions arrived at by Mr. Parsons, Mr. Phillips, and Mr. Arnould,[145d] the fact exists that the more recent Massachusetts and English cases and the Maine case

the memorandum. Averages may be added to make up the percentage. In respect of ship, such averages may be added as occur within the agreed voyage in a voyage policy, or in composing several passages in its entirety. In respect of goods or freight, such averages may be added as occur during the voyage, or any part of it, on which and whilst these subjects of insurance are at risk." He severely criticises, however, not only this case but also two of the others noted, viz., Donnell v. Columbian Ins. Co., 2 Sum. (C. C.) 366,' and Blackett v. Royal Exch. Assur. Co., 2 Cromp. & J. 250, and evidently does not agree with the conclusions favoring the aggregation of successive losses: 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 829, et seq. And see note, "Upon the origin, meaning, and history of the term 'average' as used in the maritime law": Id. 919-26, where it is said: "Average, as the English form is of this ancient classical term, when used in connection with the contract of marine insurance, signifies the whole purpose of that contract, namely, the adverting from the individual adventurer by interposition of the underwriter of all the immediate consequences of the perils mentioned." But see Lowndes on General Average, 4th ed., 270. The memorandum clauses are, in the English policy and in Lloyds' form: "Corn, fish, salt fish, flour, and seed are warranted free from average unless general. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent, and all other goods, also the ship and freight, are warranted free from average under three pounds per cent unless general or the ship be stranded."

[145b] See note 145a above.

[145c] See note 145a above.

[145d] See note 145a above.

above noted do not enter as a factor into the consideration of the point by them.[146] And this is important, although it cannot be assumed that these writers would or would not have changed or qualified their opinions, even with these cases before them had they been then decided. It may be noted here, however, that the recent Massachusetts and Maine cases in effect affirm the doctrine of the early Massachusetts case considered by Mr. Phillips,[146a] in determining what constituted the weight of authority, and the same point applies to Mr. Parsons'[146b] opinion so far as it positively asserts anything. Mr. Maclachlan's[146c] learned discussion, wherein he criticises the result of the decision before him, is certainly entitled to weight, and we regret that he could not consider the more recent Massachusetts and Maine cases.[147] If the question rested alone upon the number of decisions in this country, the rule as to the ship is against the aggregation of successive losses, although mere numbers do not necessarily constitute what is known as the weight of authority, yet the constant reassertion of a principle is another matter. Nevertheless many reasons will suggest themselves to those familiar with this branch of the law and the practice of adjustments why there should in numerous cases be an addition of successive losses on the ship. In view, therefore, of the fact that the question is beset with so many difficulties, it is with much hesitation that we incline to the rule which permits the aggregation of successive losses under voyage policies, and also under time policies within the continuance of the risk, provided in the latter case such losses are also within a separate and distinct voyage, although in its entirety it may comprise several passages, unless the policy provides otherwise, as it does in some cases.

[146] These cases were not decided until after the publication cited of their works.

[146a] See note 145a above.

[146b] See note 145a above.

[146c] See note 145a above.

[147] Paddock v. Commercial Ins. Co., 104 Mass. 521; Hagar v. New England Mut. Ins. Co., 59 Me. 460.

§ 2713. Where Liability is Limited to Invoice Value. Where the goods were damaged to an amount not equal to the invoice value, but after the damage were worth the invoice value with the cost of importation added, and it was stipulated in the bill of lading that "in the event of damage, for which the ship is responsible, the liability shall not exceed the invoice value," it was held that the carrier was liable for the actual damage.[148]

§ 2714. Particular and General Average Losses Cannot be Aggregated, nor are General Average Charges Included in Partial Loss.—If the particular average is less than the specified rate per cent, there can be no recovery, even though when added to the general average it exceeds the rate limited,[149] and it is held that in estimating the damages under a provision that there shall be no right of abandonment unless in adjustment, as of a partial loss, the sum to be paid by the insurer equals one-half the agreed value of the vessel, general average charges are not included.[150]

§ 2715. Addition of Loss by Jettison and Salvage Expenses.—If the policy stipulates against partial loss and to be "free from average" unless it amounts to ten per cent, a loss occasioned by necessary jettison may be aggregated with salvage expenses to equal the specified rate per cent; at least this is so held in a case where the boat, owing to stress of weather, ran upon a rock, necessitating a jettison and incurring of said expenses.[151]

[148] Brown v. Cunard Steamship Co., 147 Mass. 58; 16 N. E. Rep. 717; criticising The Lydian Monarch, 23 Fed. Rep. 298; Pealse v. Steamship Co., 24 Fed. Rep. 285, 289.

[149] See Billora v. Western M. & F. Ins. Co., 1 La. Ann. 57; Hotchkiss v. Commercial Mut. Ins. Co., 1 Rob. (N. Y.) 489; 2 Arnould on Marine Insurance, Perkins' ed. 1850, *866; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 834; 2 Phillips on Insurance, 3d ed., 466, sec. 1779.

[150] Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191; 33 Am. Dec. 727.

[151] Gazzam v. Cincinnati Ins. Co., 6 Allen (Mass.), 71.

§ 2716. Percentage Clause Qualified by Agreement as to Salvage and Expenses.—If the policy stipulates against liability under a specified per cent, but the insurers agree in addition to pay proportionably for salvage, they are bound for their proportion of salvage expense, though the loss does not amount to the specified rate per cent limited.[152]

§ 2717. Whether Certain Other Charges and Expenses may be Added.—If expenses are incurred to recover articles totally lost, the underwriters are not liable therefor where they are not responsible for the principal loss by reason of its being only a total loss of part under an insurance free from average.[153] So under a clause making it the duty of assured, in case of any loss or misfortune, to use all reasonable and proper means for the security, preservation, and relief of the property, although the insurers are liable for a proportion of any reasonable expenses incurred in saving the property from the operation of the perils insured against, yet it cannot be added to the damage sustained by the goods to equal the rate per cent specified.[154] The policy may expressly exclude all charges and expenses incurred for the purpose of ascertaining and proving the loss.[155] Otherwise, a question might exist whether such charges and expenses could be added to the damage to bring the loss within an exception limiting liability under the policy, although it seems to be the rule that such expenses and charges are not to be added to carry the loss beyond the limitation. So Mr. Phillips, in determining "whether the expenses of surveys, certificates, protests, and of the adjustment of the loss are to be included in determining whether a loss comes within any excep-

[152] Schultz v. Insurance Co., 1 B. Mon. (Ky.) 336.

[153] Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415. See sec. 2706, herein.

[154] Indianapolis Ins. Co. v. Mason, 11 Ind. 171. As to liability under the suing and laboring clause, see Coy v. Boylston F. M. Ins. Co., 107 Mass. 140; 9 Am. Rep. 14; Juhel v. Marine Ins. Co., 7 Johns. (N. Y.) 412. In this case it is held that expenses incurred in attempting to recover the property may be recovered in addition to total loss.

[155] So excluded in the policies in Donnell v. Columbian Ins. Co., 2 Sum. (C. C.) 366; Indianapolis Ins. Co. v. Mason, 11 Ind. 171.

tions," thinks that the proper rule is that such charges and expenses must fall upon the party upon whom the loss must have rested in case its amount had been ascertained without any expense.[156]

§ **2718. Exception of Loss under Specified Percentage —Other Insurers.**—Under a policy containing the clause "free from particular average less than fifty per cent," there can be no recovery of salvage and agent's expenses where there are other insurers and the proportion of loss payable by the respondent is less than fifty per cent of the amount of the policy."

§ **2719. Exception as to Leakage, Breakage, Dampness, etc.**—If the policy expressly stipulates against liability for leakage or for damage or injury to goods from dampness, rust, change of flavor, etc., unless the same be occasioned from a specifically designated cause, reference must be had particularly to that cause in determining whether the insurer is liable. Thus, the insurers are exempt from liability for all leakage, ordinary or extraordinary, and from whatever cause, whether gradual or violent in its operation, except those specified in case the policy provides against liability for leakage unless occasioned by stranding or collision.[157] So where the policy stipulated against liability for leakage on molasses, etc., unless occasioned by stranding or collision, but in the margin was this memorandum: "On molasses, etc., if by shifting of cargo, owing to stress of weather, any cask become stove or broken, the staves started by each other, so as to lose their entire contents, and the same amount as to fifteen per cent on the quantity laden (being five per cent over ordinary leakage) the said excess of five per cent or over on the quantity shipped to be paid for by the company, but the company not liable for leakage arising from other causes than above mentioned." It

[156] 2 Phillips on Insurance, 3d ed., 476, et seq., sec. 1791; Benecke's Principles of Indemnities, 474; 2 Arnould on Marine Insurance, Perkins' ed. 1850, *876; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 834.

[157] Cory v. Boylston F. & M. Ins. Co., 107 Mass. 140; 9 Am. Rep. 14.

was held that there could be no recovery for any loss by leakage, unless occasioned by stranding, nor for any loss by shifting of the cargo, unless such loss amounted to fifteen per cent of the quantity laden;[158] and in another case wherein it was stipulated that the liability should not extend to leakage on liquids, etc., "unless occasioned by stranding or collision," and further providing by indorsement that the insurance was "on spirits of turpentine in cases packed in boxes on deck free from loss by wet, breakage, leakage, or exposure," it was held that the insurers were exempted from liability for losses of which leakage was the proximate cause, whatever might be the cause by which the leakage itself was occasioned and, consequently, although occasioned by a peril insured against.[159] Again, in a policy on champagne wine valued by the case, it was provided that the insurers should not be liable for "damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty, or mouldy, unless the same be caused by actual contact with sea water with the articles damaged occasioned by sea peril," and it was held that, so far as the sea water came into actual contact with any case or package, the insurers were liable for any injury occasioned either by such direct contact or by heat or dampness thereby generated, but not for any injury by dampness or change of flavor to other packages, no part of which came into actual contact with the sea water,[160] and under a like clause in a policy on a cargo of barley in sacks, the malting quality of which was impaired, it was held that assuming that the damage to the sacks of barley which were not reached by the sea water, was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas, such damage was not caused by actual contact of sea water with the articles damaged within the meaning of the policy, and that the company was not liable;[161] and the same ruling has been applied to an insurance on

[158] McLaughlin v. Atlantic etc. Ins. Co., 57 Me. 170.

[159] Neilson v. Commercial Mut. Ins. Co., 3 Duer (N. Y.), 455.

[160] Cory v. Boylston F. & M. Ins. Co., 107 Mass. 140; 9 Am. Rep. 14.

[161] Neidelinger v. Insurance Co. of North America, 18 Blatchf. (C. C.) 297.

packages of teas under a like clause.[162] But if the cargo insured is in bulk, and of such a character that actual contact of sea water with a part may by absorption extend to the whole, such other portions will be affected by the cause designated as that insurers will be liable for the whole damage, but if the damage is caused by effluvia emitted by another part of the cargo of a distinct character, the insurer is not liable, even though such latter cargo is damaged by sea water. This is so held in a case of grain in bulk and hides.[163]

§ 2720. Whether under Exception of Loss under Specified Percentage the Premium Should be Deducted. It is held in Massachusetts that under an exception of liability "for a particular average the percentage must be reckoned on the valuation, less the premium.[164] This rule has not been acted on in England, but the rule there is, says Mr. Arnould, "that the underwriter is liable whenever the loss under the limitations already pointed out amounts to five per cent of the value in the policy or on the cost plus the premium and other costs of insurance," and this is restated by Mr. Maclachlan.[165] Mr. Phillips says, "The more scientific rule is to include the premium in estimating the value." [166] Mr. Parsons is of opinion that it should not be included "or else that it should be included also in estimating the amount of the value insured." [167]

§ 2721. Exception of Liability under Specified Percentage—Deviation.—If the policy stipulates against liability except the loss amount to a certain percentage and there is a deviation the insurer is not liable, unless the amount of the damage or loss sustained before the deviation equals the rate

[162] Cator v. Great Western Ins. Co., 8 L. R. C. P. 552; 42 J. C. P. 266.

[163] Woodruff v. Commercial Ins. Co., 2 Hilt. (N. Y.) 122.

[164] Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259.

[165] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *870; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 838.

[166] 2 Phillips on Insurance, 3d ed., 476, sec. 1790.

[167] 2 Parsons on Marine Insurance, ed. 1868, 135, 136. See, also, 1 Parsons on Marine Insurance, ed. 1868, 270, 271.

per cent specified, at least, this would seem to be the rule.[168] The case of a deviation, however, apparently rests upon different principles than that where the risk has terminated by its own limitation, and not by the breach of an implied condition in the policy.

§ 2722. Exception of Claim arising from Canceling of Charter.—If a policy upon freight stipulates that "no claim arising from the canceling of any charter" shall be allowed, and the adventure is frustrated by delay occasioned by perils of the sea while the vessel is on her way to a port of loading, and the voyage contemplated by the charter becomes impossible, the charter is not canceled, no agreement to actually set aside the charter being made by the parties, and insurers are liable.[169]

[168] Hare v. Travis, 7 Barn. & C. 14.

[169] In re Jameson v. Newcastle etc. Ins. Assn., 2 L. R. Q. B. D. (1895), 90; reversing 1 L. R. Q. B. D. (1895), 510, per Lord Esher, M. R.

TITLE XI.

RISKS AND LOSSES.

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CHAPTER LVIII.

RISKS AND LOSSES.

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§ 2730. What Risks and Losses may be Insured against—Liability—Generally.—There are certain general principles governing contracts of insurance and liability thereunder. Thus all losses or risks may be insured against except such as are repugnant to public policy, positive prohibition, or are occasioned by the insurer's own fraud or misconduct; there must be some interest at risk, but it is not necessary that the thing insured should have a price or be capable of being as-

signed.[1] And within these limits the parties may as a rule make such contracts as they choose, or may qualify or limit the liability assumed either by specification of the amount of indemnity or by the enumeration of certain perils, or by the exclusion of specified perils, or by a limitation of the trade in which the assured in marine risks may engage, or by other limitations in other risks too numerous to be stated, or the policy may be against all risks. It may be stated as a general rule that the loss must be occasioned by one of the perils in the policy to entitle the assured to recover.[2] The risk run must also correspond with that understood and intended to be run at the time of subscribing the policy in order to subject the insurers to the loss.[3] So the liability on a fire policy is simply to indemnify the assured for any loss actually sustained by him through the burning of the insured premises.[4] And as indemnity is the object of insurance, and it is a rule in marine risks that where the loss is of a like nature with the specified peril, or substantially within its meaning, the underwriters are liable.[5] The loss of the voyage as to the cargo is not a loss of the voyage as to the ship.[6] And if a vessel by reason of the perils against which she is insured is unable to proceed with her original cargo, it is a loss of the voyage, though she may be capable of performing it with a lighter cargo.[7] If a cargo is insured on a canal boat against perils of the "seas, rivers," etc., these words will cover and include the perils of canal navigation.[8] So a contract of insurance must be regarded as a fire risk where the hazard is fire alone, and the subject is an unfinished vessel never afloat for a voyage and not a subject for marine navigation.[9] If it is clearly evident from

[1] Bell v. Western etc. Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542.

[2] Swan v. Union Ins. Co., 3 Wheat. (U. S.) 168; Cleveland v. Winn, 8 Mass. 308.

[3] Norris v. Insurance Co. of North America, 3 Yeates (Pa.), 84; 2 Am. Dec. 360.

[4] Flanagan v. Camden Mut. Ins. Co., 25 N. J. L. (1 Dutch.) 506.

[5] Monongahela Ins. Co. v. Closter, 43 Pa. St. 491.

[6] Alexander v. Baltimore Ins. Co., 4 Cranch (U. S.), 370.

[7] Abbott v. Broome, 1 Caines (N. Y.), 292; 2 Am. Dec. 187.

[8] Protection Ins. Co. v. Wilson, 6 Ohio St. 553.

[9] Eureka Ins. Co. v. Robinson, 56 Pa. St. 2; 94 Am. Dec. 65.

the order for insurance and acceptance that neutral and belligerent risks were intended to be covered, such risks will be included.[10]

§ 2731. **Abortion—Public Policy.**—Death as the result of an abortion is not ground of recovery, it being against public policy to permit the enforcement of the claim.[11]

§ 2732. **Accident Disabling Ship—Chartered Freight.** If an insurance is effected against loss of chartered freight under a clause in a charter party stipulating that the payment of the hire of the ship shall cease if, during the specified time, she becomes disabled by accident, and the ship sustains a damage by accident which is not discovered until after the expiration of the charter party, so that no loss of freight is sustained, no recovery can be had against the underwriters, even though renewal of the charter party is prevented by reason of delay for necessary repairs.[12]

§ 2733. **Advances—Bottomry Draft—Entire Contract—Freight Earned at Intermediate Port—Salvage—Owner's Liability.**—If an insurance be effected on advances against a bottomry draft for the payment of which the vessel and freight are pledged, and the advances are made on an obligation of the master to pay within a specified time after arrival at the final port of destination, and the consignees at said port are directed to pay the same from the first amount of freight received, the contract is not divisible, the insurance begins when the risk begins, ends when it ends, and the lender's risk continues until the vessel reaches the final port or is lost. This contract differs from an insurance on ship or freight under a risk of this character. If freight is received at an intermediate port it does not then diminish the bottomry lender's risk on his advances, since it is not then legally available to him, and may never

[10] Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159
[11] Hatch v. Mutual Life Ins. Co., 120 Mass. 550.
[12] Hough v. Head, 54 L. J. Q. B. 294; 33 Week. Rep. 458.

become so, and if the vessel founders and becomes a total loss before the final port is reached the insurers are liable, nor does the freight so earned and collected discharge the insurance pro tanto, although the bottomry lender would, however, be entitled to salvage, if any. As to the freight received, which was stated in a letter from the owner to be "only enough to pay expenses for discharging at a port of distress, and the owners got no benefit," it may be inferred that the master lawfully used it for the necessities of the voyage; nor under the German Code, article 452, does any personal liability rest upon the owner for contracts made by the master in his ordinary capacity. The perils insured against in this case were all those "of the seas which reduce the things hypothecated to a less value than the sums insured, or which prevent the collection of said draft in whole or in part."[13]

§ 2734. "All Risks"—General Policy—War Risks.—An insurance may be in general terms by a policy covering all risks. Thus, a policy against "all risks" inserted in writing covers everything that may happen except by the fraudulent acts of the insured.[14] And a policy insuring against all marine risks is just as binding and effectual as if the risks are specified in detail.[15] So an insurance on horses on a voyage against "all risks, including death from any cause whatever," will entitle assured to recover for the loss of a horse caused by injuries sustained on the voyage owing to heavy weather.[16] A general policy unaccompanied with any warranty covers war risks of all kinds and of all countries.[17] This has reference necessarily, however, to such risks only as are legal,[18]

[13] Force v. Providence-Washington Ins. Co., 35 Fed. Rep. 767.

[14] Goix v. Knox, 1 Johns. (N. Y.) Cas. 337. But see Marcy v. Sun Mut. Ins. Co., 11 La. Ann. 748.

[15] Parkhurst v. Gloucester Mutual Fishing Ins. Co., 100 Mass. 301; 1 Am. Rep. 105; 97 Am. Dec. 100.

[16] Coit v. Smith, 3 Johns. (N. Y.) 16.

[17] Barnewall v. Church, 1 Caines (N. Y.), 217; 2 Am. Dec. 180. See Parker v. Jones, 13 Mass. 173; Merchants' Ins. Co. v. Edmond, 17 Gratt. (Va.) 138; Elting v. Scott, 2 Johns. (N. Y.) 157.

[18] See chaps. xlii and liv, herein.

and involves other questions, such as concealment, etc., which have been considered elsewhere. Where the underwriters assume the "risks contained in all regular policies," a loss by capture is within the policy. And parol evidence is not admissible to prove that the parties understood it as covering sea risks only.[19] But a loss happening from condemnation on the ground of an attempted rescue is not within a policy on the usual risks.[20] Whether a risk is a "marine" or "war risk" is sometimes a question; as when a steamer during the Civil War was chartered by the government and was wrecked by ice in the Potomac, it was held a "marine" risk.[21] Where the insurance was upon a Sidmouth license from Boston to Alexandria against loss by capture or "its being destroyed by the ordinary perils of the sea, fire, or otherwise," and the vessel was boarded by a British ship of war and the license so indorsed that its value was destroyed as to any other vessel, this was held a loss within the policy; [22] and if all risks are taken, this covers mutiny and insurrection if not excepted; as in case of an insurance on slaves.[23] So a policy against all risks includes the barratry of the master and mariners, even when the owner of the vessel himself appoints them.[24]

§ 2735. "All Other Perils," etc.—"All Unavoidable Perils"—"All Such Perils."—After the enumeration of certain perils which the insurer assumes in marine risks, there follows a general clause in which the English policy reads as follows: "All other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of said goods and merchandises and ship, etc., or any part thereof." This is not, however, the exact language of all policies using the

[19] Levy v. Merrill, 4 Greenl. (4 Me.) 180.

[20] Robinson v. Jones, 8 Mass. 536.

[21] Reybold v. United States, 15 Wall. (U. S.) 202.

[22] Perkins v. New England M. Ins. Co., 12 Mass. 215.

[23] McCargo v. Merchants' Ins. Co., 10 Rob. (La.) 334: Lockett Merchants' Ins. Co., 10 Rob. (La.) 339.

[24] Parkhurst v. Gloucester etc. Co., 100 Mass. 301; 97 Am. Dec. 100; 1 Am. Rep. 105.

general clause, for the form varies.[25] This clause, says Lord Ellenborough, "may have the effect of extending reasonable indemnity to many cases not distinctly covered by the special words; they are entitled to be considered as natural and operative words," and he also declares that they "comprehend and cover other cases of marine damage of like kind with those specifically enumerated and occasioned by similar cases." And the clause was held to cover a case where a vessel, being mistaken for an enemy's ship, was fired into and sank, the loss was held within such a clause.[26] This language of Lord Ellenborough has been substantially adopted as a rule by text-writers both in England and in this country.[27] It is also substantially adopted by Mr. Justice Duer in a case in this country,[28] and by Lord Bramwell in an English case decided in 1887;[29] and although the words are broad enough, yet they are, to the extent above indicated, limited in their application by the specification which immediately precedes them.[30] It

[25] A form used in San Francisco on cargo reads: "All other losses and misfortunes that have or shall come to the hurt, damage, or detriment of the said property or interest to which the insurers are liable by the rules and customs in San Francisco, excepting such losses and misfortunes as are excluded by this policy," and on vessel the clause reads: "All other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which the insurers are liable by the rules and customs in San Francisco, including the rules for adjustment printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy." So also in other cases the form varies.

[26] Cullen v. Butler, 5 Maule & S. 461; 4 Camp. 289; 1 Stark. 110, per Lord Ellenborough.

[27] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *842; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 789; 1 Parsons on Marine Insurance, ed. 1868, 544, 612-14; 1 Phillips on Insurance, 3d ed., 644-66, sec. 1126.

[28] Moses v. Sun Mut. Ins. Co., 1 Duer (N. Y.), 159, per Duer, J.

[29] Thames etc. Ins. Co. v Hamilton, L. R. 12 App. Cas. 484.

[30] Moses v. Sun Mut. Ins. Co., 1 Duer (N. Y.), 159, per Duer, J. See, as to this principle, Moore v. Magrath, 1 Cowp. 12, per Lord Mansfield; Lyndon v. Stanbridge, 2 Hurl. & N. 51, per Pollock, C. B.; Vaughan v. Porter, 16 Vt. 266; Bank of British North America v. Convilleer, 14 Moore P. C. 187; Regina v. Edmondson, 2 El. & E. 83, per Lord Campbell, C. J.; Agar v. Atheneum Life Assur. Soc., 3 Com. B., N. S., 725; Rich v. Lord, 18 Pick. (Mass.) 322.

may be stated here, however, that Mr. Phillips, relying upon a case quoted under the preceding section,[31] is of opinion that if a clause of this character be written in, it has a paramount force, and includes all perils which can be legally covered.[32]

§ **2736. Same Subject—Cases.**[32a]—Under the decisions this clause covers a loss by collision,[33] by explosion,[34] an injury caused by the vessel's being thrown over, owing to her fastenings at her moorings giving away at the ebbing of the tide,[35] an injury caused by the vessel's being blown over while in a graving dock for repairs after discharging her cargo,[36] a loss by barratry,[37] a loss incidental to capture or in the nature of jettison, as where specie was sunk, thrown overboard, in shallow water to save it from capture, the act not being that of assured,[38] and a loss caused by a mob of citizens of the confederate forces during the Civil War compelling the vessel to land and taking possession of her and her cargo, whereby the cargo insured was totally lost.[39] If the policy covers "unavoidable" dangers this does not refer to the duties of those in charge of the boat, but to such perils as are incident to navigation and from their nature inseparable from it, and such as are embraced in the policy,[40] nor is the necessary sale and consumption of a cargo of provisions at an intermediate port covered by the general clause.[41]

[31] Goix v. Knox, 1 Johns. Cas. (N. Y.) 337.

[32] 1 Phillips on Insurance, 3d ed., 666, sec. 1126.

[32a] See sec. 2734, herein.

[33] Caldwell v. St. Louis Perpetual Ins. Co., 1 La. Ann. 85.

[34] Perrin v. Protection Ins. Co., 11 Ohio, 147; Citizens' Ins. Co. v. Glasgow, 9 Mo. 406.

[35] Napier v. Wood, 4 C. C. S. 19.

[36] Phillips v. Barber, 5 Barn. & Ald. 101. See Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14; De Vaux v. Janson, 5 Bing. N. C. 519.

[37] Jones v. Nicholson, 10 Exch. 28.

[38] Butler v. Wildman, 3 Barn. & A. 398.

[39] Babbitt v. Sun. Mut. Ins. Co., 23 La. Ann. 314; Monongahela Ins. Co. v. Chester, 43 Pa. St. 491 (the general clause in this case was "all such losses"); De Peau v. Russell, 1 Brev. (S. C.) 441; 2 Am. Dec. 676.

[40] Louisville Underwriters v. Pence, 93 Ky. 96; 19 S. W. Rep. 10; per Holt, C. J.

[41] Moses v. Sun Mut. Ins. Co., 1 Duer (N. Y.), 159.

§ 2737. "Arrests, Restraints, and Detainments," etc. —Marine Risk.—The usual clause is "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever." This may be divided into two general parts: The first concerns what constitutes an arrest, restraint, or detention; the second concerns the point who are kings, princes, and people. In determining what is an arrest much depends upon the original design with which the act was done, as well also as upon the existing conditions as to war. An arrest as such is to be distinguished from capture, although an arrest may be a capture. In an arrest there is a temporary detention, with no design to deprive the owner of the vessel, but to liberate or restore the ship or goods detained or to pay the value thereof; whereas in capture there is the design on the part of the captor to appropriate as a prize. But it is none the less an arrest where there is no restoration or payment of value, since the apparent design in doing the act controls. There may be an arrest at sea as well as in port or harbor, but if there is an arrest at sea of a neutral vessel, and a forcible taking into a belligerent port under pretense that she is an enemy or laden with hostile effects, it is such an act of war or hostility as makes it a capture, even though there is a subsequent restoration. So the detention in a hostile country of a vessel after war declared or letter of reprisal issued against the country to which the vessel belongs is of the nature of a capture, though there is a subsequent restoration. An arrest may take place by act of the government of the country to which the ship belongs or of any power which is friendly. Such are substantially the general principles cited by Emerigon and adopted by Mr. Marshall, Mr. Arnould, and Mr. Maclachlan.[42] The words "kings, princes, and people," etc., limits the effect of the preceding words of this clause, and a mob or numbers taking control of the vessel is not within

[42] Emerigon on Insurance, Meredith's ed. 1850, c. xii, 30, p. 420, et seq.; 2 Marshall on Insurance, ed. 1810, *506, et seq.; 2 Arnould on Marine Insurance, Perkins' ed. 1850, *812, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 765, et seq. See Barker v. Blakes, 9 East, 283; Fouler v. English etc. Ins. Co., 34 L. J. C. P. 207.

the meaning of the word "people," which means the ruling power of the country, the supreme power, whatever it be, and the words "kings, princes, and people" are said to apply to nations in their collective capacity.[43] It is also held that such a clause applies to captures, detentions, etc., by the commissioned agents of a lawful government, and does not cover a loss caused by a mob in a foreign port.[44] It is also declared that these words "arrests," etc., do not have reference to legal proceedings instituted and legally conducted.[45] The general question whether there is an arrest or detention merely or a capture may depend upon the cessation of hostilities, as well as upon the declaration of war.[46] A detention by an epidemic and consequent damages is within this clause as to arrests, detention, etc.[47] If goods of a neutral are in a belligerent port, prevented from being forwarded by the opposing belligerent, this is within the clause.[48] Again, if necessities of state warrant an arrest, detention, or seizure by this government of a vessel of this country, this is covered by said clause.[49] Where a vessel was boarded off the bar at Tampico, her port of destination, and ordered away by the French blockading squadron, this was held a restraint.[50] The test, as will be

[43] Nesbit v. Livingston, 4 Term Rep. 783, per Lord Kenyon, C. J., and Buller, J.; reported also in 2 Marshall on Insurance, ed. 1810, 508b; Simpson v. Charleston F. & M. Ins. Co., Dudley (S. C.), 239.

[44] McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 202; 43 Am. Dec. 180.

[45] Finlay v. Liverpool & G. W. Steamship Co., 23 L. T., N. S., 251.

[46] Spencer v. Franco, Beawes, 4th ed., 416, reported in 1 Marshall on Insurance, ed. 1810, 514a, per Lord Hardwicke, C. J. See, also, Hamilton v. Mendes, 2 Burr. 1211, per Lord Mansfield.

[47] Williams v. Smith, 2 Caines (N. Y.), 1.

[48] Rodocanachi v. Elliott, L. R. 8 C. P. 649.

[49] Fouteng v. Hubbard, 3 Bos. & P. 302, per Lord Alvanley; Lorent v. South Carolina Ins. Co., 1 Nott & McC. (S. C.) 503; Hagedorn v. Whitmore, 1 Stark. 157; Green v. Young, 2 Ld. Raym. 840; Salk. 444; 2 Marshall on Insurance, ed. 1810, 510a; Park on Insurance, 6th ed., 109. See sec. 2685, herein.

[50] Vigors v. Ocean Ins. Co., 12 La., O. S., 362; citing Olivera v. Union Ins. Co., 3 Wheat. (U.S.) 183. See sec. 2776, herein, "Blockade." Emerigon notes the case of an arrest before the commencement of the voyage, that is, before the ship sails, which was the commencement of the risk under the law of that country, and says

noted, is the commencement of the risk, so that in policies on the ship where the risk commences in port the rule is said to be that an arrest thereafter of the ship, even though the voyage had not commenced, would be within the clause.[51] Although there might be a technical arrest or even capture of ship or goods by the home government, the liability of assurers, or the fact of an actual or technical total loss, may depend upon the amount reimbursed by the government.[52] The clause "arrests, restraints," etc., most frequently comprehends the case of an embargo, under which head other cases on this point will be noted.

§ **2738. "Arriving in Port" does not Cover Arrival in Cove.**—"Arriving in port" does not cover putting in distress into a cove which is not a "port," and taking wood and water there, in the absence of a previous intention to do so,[53] since the word "port" does not include a recess of the sea to which resort is not had for landing goods.[54]

§ **2739. "Unlawful" Arrests, Restraints, Detainments, etc.**—Sometimes the clause covering arrests, restraints, detainments, etc., is precluded by the word "unlawful." In such case the qualification "unlawful" extends as well to "restraints and detainments" as to "arrests," and a detainment

the "losses and damages happened to the vessel and all expenses made for her during that time are foreign to the insurers," but that the rule does not apply to the case of goods. Still, in such case, "they are at the risk of the insurers from the moment of their being laden on board the vessel": Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 30, pp. 422, 423.

[51] See Green v. Young, Salk. 444; 2 Ld. Raym. 840; Rotch v. Edie, 6 Term Rep. 413; Viger v. Prescott, 5 Esp. 184; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 312; 1 Marshall on Insurance, ed. 1810, 510a.

[52] See sec. 2685, herein. "I have no doubt that in point of strict law the assured is entitled to recover as for a total loss, deducting, however, the money paid him by the arresting government from the amount of his claim under the policy," referring to goods and seizure by home government or friendly power: 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 768.

[53] Hart v. Marine Ins. Co., 26 Nov. Sco. 428, 440.

[54] Hart v. Marine Ins. Co., 26 Nov. Sco. 428, 440.

by a force, lawfully blockading a port, is not a peril insured against by a policy containing a warranty of neutrality.[55] Where a neutral vessel laden with a neutral cargo had sailed before the institution of a blockade, but before she could get out to sea was ordered back by the blockading squadron and abandonment immediately offered, this was held an unlawful restraint, for which the insurers were liable under a policy against unlawful arrests, restraints, etc.[56] But where a blockade is lawful, this makes a restraint so far lawful that the clause as to "unlawful arrests, restraints," etc., does not cover the loss.[57]

§ 2740. Bank's Default—Money Deposited in Bank—Vested Rights upon Default.—If the "assured" be guaranteed indemnity against the loss of a sum of money deposited in the bank, and the event designated—namely, the default of payment by the bank—takes place, the insurers are liable for the loss. The contract is one of insurance, but whether the contract be deemed one of suretyship or of insurance, the right of "assured" becomes vested under the contract upon default made by the bank, and any scheme subsequently entered into between the bank and its creditors, whereby the bank under a local statute is discharged, but not by way of accord and satisfaction, does not prevent a recovery, there being no assent to such scheme by "assured," and this is so even though the discharge is binding upon him by the local statute.[58] In a Scotch case money was loaned to an Australian bank upon a deposit receipt, and the creditor insured the deposit with an insurance company, which guaranteed that in case the debtor failed to repay the deposit within twenty-one days from the

[55] M'Call v. Marine Ins. Co., 8 Cranch (U. S.), 59.

[56] Olivera v. Union Ins. Co., 3 Wheat. (U. S.) 183.

[57] Thompson v. Read, 12 Serg. & R. (Pa.) 440. See Patterson v. Marine Ins. Co., 5 Harr. & J. (Md.) 417.

[58] Dane v. Mortgage Ins. Corp., Lim. (Eng. C. A. 1894), 1 Q. B. D. L. R. 54. In this case the money was deposited by plaintiff in the Bank of Australia; the discharge was effected under a colonial statute by agreement between the bank and the creditors aided by the court. See, also, Young v. Trustee A. & I. Ins. Co., Lim. (Scot. C. S. 1894), 31 Scot. L. R. 199.

date named in the deposit receipt, it would pay the insured the amount of the deposit with interest, the insured, however, upon such payment, to hand over to the insurers "the deposit and all his rights in respect thereof." The deposit, which became due on the 15th of May, was not paid, as the bank suspended payment on the 4th of April. On the 26th of April a scheme of compromise was sanctioned by the court of Victoria, by which a new company assumed the liabilities of the bank, and this scheme the appeal court opposed with some alterations on June 19th. It was held that the insurer was liable for the amount of the deposit, since the insured had, upon the failure of the bank to make the repayment as provided, satisfied the condition of the policy by offering to transfer the deposit and all his rights in respect thereof.[59]

§ **2741. Barratry Defined—Marine Risk.**—"Barratry," says Emerigon, "is a barbarous word, and unknown to antiquity. Pasquier says it comes from 'barat,' which signifies fraud, trickery, falsehood." [60] An act of barratry relates to acts or conduct of the master or mariners in their character as such which is fraudulent or criminal against the owners, whereby the latter are damnified. It may be committed against the owners of the cargo or ship, or against the charterers of the ship, who are owners pro hac vice. It comprehends any gross malversation in office by the master or gross criminal negligence operating in fact to the owner's prejudice, whether so intended or not, any trick, cheat, or fraud, or any crime or willful, intentional breach of known law, or willful act of known illegality against the interests and rights and to the prejudice of the owners, and without their consent, or an act in evasion of or contrary to their orders and instructions, and even willful nonfeasance may in certain cases be barratry. It also includes every breach of trust dishonestly intended to the owner's prejudice, nor in the above cases is the intention on the master's part to benefit himself an essential ingredient

[59] Laird v. Securities Ins. Co. (Ct. of Sess.), 32 Scot. L. R. 319.
[60] Emerigon on Insurance, Meredith's ed. 1850, c. xii. sec. 3, p. 292.

of the offense.[61] A mere error or defect in judgment or negligence on the part of the master, although the result is a total loss of the property, is not barratry of the master where there has been no criminal or fraudulent intent, and even though his conduct may have been in any way wrongful, and while it is clearly the duty of the master to do all in his power to save property committed to his charge, yet if he fails in this through an error in judgment, the underwriters are not excused because of an exception of barratry in the policy.[62]

§ **2742. Barratry Covers What—Cases.**—Barratry of the master and crew covers thefts, pilferings, or embezzlements by either, and thefts by the mariners are covered, whether due care and vigilance of the master could have prevented them or not, and so also is willful destruction of property covered;[63] although it is held that a loss by embezzlement on the part of the crew does not render the insurer lia-

[61] Germania Ins. Co. v. Sherlock, 25 Ohio St. 33; Wiggin v. Amory, 14 Mass. 1; 7 Am. Dec. 175; Wilcox v. Union Ins. Co., 2 Binn. (Pa.) 574; 4 Am. Dec. 480; Macardler v. Chesapeake Ins. Co., 8 Cranch (U. S.), 39; Heyman v. Parish, 2 Camp. 149; Atkinson v. Great Western Ins. Co., 65 N. Y. 531; Haverlock v. Hancell, 3 Term Rep. 227; Erle v. Rowcroft, 3 East, 139, per Lord Ellenborough; Messonier v. Union Ins. Co., 1 Nott & McC. (S. C.) 155; Wilson v. General Mut. Ins. Co., 12 Cush. (Mass.) 360; 59 Am. Dec. 188; Pipon v. Cole, 1 Camp. 434; American Ins. Co. v. Dunham, 15 Wend. (N. Y.) 9; Hibbert v. Martin, 1 Camp. 538; Crousillet v. Ball, 4 Dall. (U. S.) 294; American Ins. Co., v. Dunham, 15 Wend. (N. Y.) 9; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222, per Johnson, J.; Soares v. Thornton, 7 Taunt. 627; 1 Moore, 373; Store v. National Ins. Co., 19 Pick. (Mass.) 37, per Putnam, J.; Pyn v. Royal Exch. Assur. Co., 7 Term Rep. 505; Dederer v. Delaware Ins. Co., 2 Wash. (C. C.) 61, per Washington, J.; Dixon v. Reid, 5 Barn. & Ald. 597; 1 Dowl. & R. 207; Boehm v. Combe, 2 Maule & S. 172; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; Walden v. Fireman's Ins. Co., 12 Johns. (N. Y.) 128; Kendrick v. Delafield, 2 Caines (N. Y.), 67.

[62] Wolff v. Merchants' Ins. Co., 3 New Brun. 577, per Tuck, J.

[63] American Ins. Co. v. Bryan, 26 Wend. (N. Y.) 563; affirming 1 Hill (N. Y.), 25; 37 Am. Dec. 278; Marcardier v. Chesapeake Ins. Co., 8 Cranch (U. S.) 39; Stone v. National Ins. Co., 19 Pick. (Mass.) 34; Falkner v. Ritchie, 2 Maule & S. 290; Lawton v. Sun Mut. Ins. Co., 2 Cush. (Mass.) 500.

able,[64] and also that stealing by the mariners other than petty thefts is barratry.[65] If the master, without the knowledge of his owner, lades on board the vessel such goods as will subject him to condemnation for illicit traffic, it is barratry.[66] Resistance by the master and seamen of a neutral vessel of a search by a belligerent is barratry.[67] The crew of a neutral vessel captured as a prize are not obliged to navigate her. It is the duty of the captors to take charge of her with a force of their own, and if they neglect to do this they do not take sufficient possession, and the neutrals may consider her as abandoned to them. But if an insufficient force is put on board, in consequence of a promise by the neutral crew to navigate her to the destined port, they are bound by their promise, and must be considered for the purpose agreed on as acting under the captors. If in violation of this agreement they take the vessel into their own hands, it is an unlawful rescue, which is an act of barratry.[68] A fire intentionally caused by the direct act of the master and crew for barratrous purposes is barratry.[69] An insurance against all risks or the usual risks, there being no stipulation to the contrary, includes barratry of the master and mariners, and it is immaterial that the assured was the owner of the vessel and appointed the master and mariners. Thus, barratry of master is insured against in a policy on a vessel "lost or not lost" which does not define risks assumed by the insurers otherwise than by a clause that they "are not in any case to be held to pay for any loss or damage in consequence of restraint, seizure, or detention by any legal or illegal power whatsoever, or for any loss, damage, or accident which may happen or occur to any vessel while she may be

[64] Hicks v. Fitzsimmons, 1 Wash. (C. C.) 279.

[65] Stone v. National Ins. Co., 19 Pick. (Mass.) 34.

[66] Suckley v. Delafield, 2 Caines (N. Y.), 222. See Hallett v. Columbian Ins. Co., 8 Johns. (N. Y.) 222, n.; American Ins. Co. of New York v. Dunham, 15 Wend. (N. Y.) 9; affirming 12 Wend. (N. Y.) 463; cited Dole v. New England etc. Ins. Co., 2 Cliff. (C. C.) 433.

[67] Brown v. Union Ins. Co., 5 Day (Conn.), 1; 5 Am. Dec. 123; Dederer v. Delaware Ins. Co., 2 Wash. (C. C.) 61.

[68] Wilcox v. Union Ins. Co., 2 Binn. (Pa.) 574; 4 Am. Dec. 480.

[69] Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213; 1 McLean (C. C.), 275.

under such restraint, seizure, or detention;"[70] although acts of barratry, such as misconduct of the master and crew, by which the vessel is lost are held to be at the risk of the owner, and not within the terms of the policy unless expressly insured against,[71] and a loss by fire caused by barratrous acts is not covered when the policy contains no clause as to barratry.[72] Putting on board secretly by the captain contraband goods, whereby the vessel and cargo is condemned, is barratry.[73] An act of the master in violation of the laws of the land, as by trading with an enemy, is barratry.[74] Insurers are liable for barratry of second mate succeeding to command of a vessel while on her voyage by the death of the master and first mate, under a policy insuring against the barratry of the mariners but not against that of the master.[75] The fraudulent conversion by the master of the cargo to his use and absconding is barratry, even though the master is consignee or supercargo.[76] The sale or disposal by the master of any of the ship's furniture, tackle, outfits, etc., for his own use and benefit is barratry.[77] So also is the fraudulent sale and purchase by the master of the vessel,[78] or a fraudulent sale and application of the proceeds to his own use by the master, even though a part owner,[79] or deviating and selling the vessel by the captain.[80] Continuous acts of smuggling which reasonable dili-

[70] Parkhurst v. Gloucester etc. Ins. Co., 100 Mass. 301; 97 Am. Dec. 100; 1 Am. Rep. 105; Oliver v. Mutual Ins. Co., 2 Curt. (C. C.) 291.

[71] Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; 41 Am. Dec. 661. See next section.

[72] Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213.

[73] Baltimore Ins. Co. v. Taylor, 3 Har. & J. (Md.) 198.

[74] Earle v. Rowcroft, 8 East, 126.

[75] Tate v. Protection Ins. Co., 20 Conn. 48; 52 Am. Dec. 350.

[76] Cook v. Commercial Ins. Co., 11 Johns. (N. Y.) 40; Earle v. Rowcroft, 8 East, 126; Kendrick v. Delafield, 2 Caines (N. Y.), 67.

[77] Lawton v. Sun Mut. Ins. Co., 2 Cush. (Mass.) 500.

[78] Steinbach v. Ogden, 3 Caines (N. Y.), 1.

[79] Jones v. Nicholson, 10 Exch. 28; 23 L. J. Ex. 330; Phœnix Ins. Co. v. Moog, 78 Ala. 284, 304, 305; Hutchins v. Ford, 32 Me. 363, 368, 369; Voisin v. Commercial Mut. Ins. Co., 41 N. Y. St. Rep. 884; 16 N. Y. Supp. 410; 62 Hun (N. Y.), 4, per Daniels, J. But see next section; Wilson v. General Mut. Ins. Co., 12 Cush. (Mass.) 360; 59 Am. Dec. 188.

[80] Dixon v. Reid, 5 Barn. & A. 597; Millaudon v. New Orleans Ins.

gence could have prevented is not covered.[81] But the barratry in case of smuggling may be immaterial where there is a warranty against seizure which constitutes the basis of loss.[82] Putting to sea for an intermediate port in an unseaworthy conditon, barratry of the master and mariners being insured against, is not such an act as renders the owners of goods insured liable.[83] Fraudulent collusion with the enemy, whereby the ship is captured, is barratry.[84] So there may be barratry where part of the transportation is by land.[85] A deviation to enable the master to commit an act of barratry does not release the insurer.[86] The fraudulent acts of the master, acting in conspiracy with others and loading the vessel with cases of dirt and shipping it as valuable cargo, and afterward boring holes in the ship and then abandoning the vessel at sea, the purpose being to obtain insurance moneys thereon, is a barratrous act covering the loss of cargo on board.[87] The fraudulent act of the master in sailing to a blockaded port is barratrous.[88] If the master so uses turpentine on board as to clearly violate his express duty, he is subject to the loss arising therefrom, as where it was used to increase the head of steam and took fire and burned the vessel, under an act of Congress requiring turpentine to be secured upon steamboats in metallic safes or metal apartments.[89]

§ 2743. Barratry, what Losses are not Covered—General Rules.—Although, as stated in the preceding section, mere nonfeasance may amount to barratry, yet acts done

Co., 11 Mart. (La.) 602; Toulmin v Inglis, 1 Camp. 420; Hucks v. Thornton, Holt N. P. 40; Toulmin v. Anderson, 1 Taunt. 227.

[81] Pipon v. Cope, 1 Camp. 434.

[82] Cory v. Burr, 8 Q. B. D. 313.

[83] Brioso v. Pacific Mut. Ins. Co., 4 Daly (N. Y.), 246.

[84] Archangelo v. Thompson, 2 Camp. 620.

[85] Boehm v. Combe, 2 Maule & S. 172.

[86] Roscow v. Corson, 8 Taunt. 684.

[87] Voison v. Commercial Mut. Ins. Co., 41 N. Y. St. Rep. 884; 16 N. Y. St. Rep. 410; 62 Hun (N. Y.), 4.

[88] Goldschmidt v. Whitmore, 3 Taunt. 508.

[89] Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; Act of Congress Aug. 30, 1853.

through negligence, unless so gross as to be per se evidence of fraud, are not barratrous, nor are those acts barratrous which proceed from mere errors of judgment or from incompetence or ignorance of the master, nor those which are merely accidental and which are not willful, nor done for some fraudulent or known unlawful purpose, and which involve no criminal or willful or fraudulent violation of that duty which is due to the owners. Not every illegal act is a criminal one. There may be an ignorant breach of blockade, or ignorant violation of a foreign law; there may be a mistake as to what is meant by the instructions, or a doubt as to his exact line of action within those instructions, and such acts are not barratrous. But fraud whereby the master seeks his own benefit or advantage to the prejudice of the owner's interest is not in such sense a necessary element; it is sufficient that it be any unlawful act of known criminality or of gross malversation, as stated in the preceding section. If, however, the act be in fact to the master's interest, it is fraud or evidence thereof.[90] Barratry of the master and crew of a steamboat is not covered by a policy unless specially stipulated,[91] and though the act of the master be barratry, there can be no recovery unless it produces or is the cause of the loss, and the loss must happen within the time of the policy;[92] and the act must be committed within the time limit of the policy, and does not cover a seizure and condemnation to the government after the ex-

[90] Atkinson v. Great Western Ins. Co., 65 N. Y. 531; Messonier v. Union Ins. Co., 1 Nott & McC. (S. C.) 155; Phyn v. Royal Exch. Assur. Co., 7 Term Rep. 505; Vose v. Union Ins. Co., 2 Johns. Cas. (N. Y.) 187; Patapsco Ins. Co. v. Coulters, 3 Pet. (U. S.) 222, 234; Bottomley v. Bovill, 5 Barn. & C. 212; Earle v. Rowcroft, 8 East, 129; Wiggin v. Amory, 14 Mass. 1; Grim v. Phœnix Ins. Co., 13 Johns. (N Y.) 457; Todd v. Ritchie, 1 Stark. 240, per Lord Ellenborough; Heyman v. Parish, 2 Camp. 149; Dederer v. Delaware Ins. Co., 2 Wash. (C. C.) 61, per Washington, J.; Everth v. Hannam, 6 Taunt. 375, and cases in the first note under last section.

[91] Gazzam v. Ohio Ins. Co., Wright (Ohio), 202; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; Howell v. Cincinnati Ins. Co., 7 Ohio, pt. 1, 276; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; 41 Am. Dec. 661; Fulton v. Lancaster Ins. Co., 7 Ohio, pt. 2, 5. See preceding section.

[92] Swan v. Union Ins. Co., 3 Wheat. (U. S.) 168; Lockley v. Offyer, 1 Term Rep. 252; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222.

piration of said period of time, and even though the forfeiture relates back to the time of the infraction of the law; the object is to prevent frauds on the government.[93]

§ **2744. Barratry, what Losses are not Covered—Cases.** The master's failure to repair or to reship cargo is not barratry,[94] nor is an unintentional violation of a blockade.[95] Emerigon places at the charge of the insurers against barratry the damages occasioned through the desertion of sailors.[96] But if a vessel captured and libeled as prize is deserted by the crew, it is not barratry if not done malo animo.[97] Acts of misconduct committed with the owner's consent or by the owner himself are not barratry,[98] and where the master charters a vessel and mans and victuals her at his own cost, he is the owner pro hac vice, and no act of his will amount to barratry.[99] But where the insured charters the vessel excepting certain portions, the charterers to pay the master and mariners, the charterers are not owner pro hac vice,[100] although where the master hires the vessel by parol for a term he is owner, and cannot commit barratry.[101] And a master may have such an equitable interest in a ship, as where he has given his note and pledged the vessel as collateral for purchase money, as to be so far the owner that he cannot commit barratry.[102] So where the master is also the owner the insurer is not lia-

[93] Maiatigue v. Louisiana Ins. Co., 8 La. 65; 28 Am. Dec. 129. See Lockyer v. Offley, 1 Term. Rep. 252.

[94] Stewart v. Tennessee M. & F. Ins. Co., 1 Humph. (Tenn.) 242.

[95] Everth v. Hannam, 6 Taunt. 375; Dederer v. Delaware Ins. Co., 2 Wash. (C. C.) 61, per Washington, J.

[96] Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 8, p. 310.

[97] Messonier v. Union Ins. Co., 1 Nott & McC. (S. C.) 155. Desertion is a criminal offense: Rev. Stats. U. S., sec. 4596. See United States v. Mason, 34 Fed. Rep. 129. For forfeiture of wages for desertion, see The Rothemay, 34 Fed. Rep. 80; Disbrow v. Walsh Brothers, 36 Fed. Rep. 607.

[98] Ward v. Wood, 13 Mass. 339; Stamma v. Brown, 2 Strange 1247; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386.

[99] Hallett v. Columbian Ins. Co., 8 Johns. (N. Y.) 272; McIntyre v. Bowne, 1 Johns. (N. Y.) 229.

[100] McIntyre v. Bowne, 1 Johns. (N. Y.) 229.

[101] Taggard v. Loring, 16 Mass. 336.

[102] Barry v. Louisiana Ins. Co., 11 Mart. (La.) 630.

ble for loss by barratry by him,[103] and the acts of the charterer in smuggling goods are those of the owner.[104] So where the master, who was general owner, let the ship on freight to insured for the voyage, the master retaining possession and command, it was held a mere contract of affreightment, and that the freighter was not the owner, and the master was not in a position to commit barratry.[105] One who hires the ship for the voyage and has exclusive control, possession, and navigation of the ship is the owner, and cannot commit barratry.[106] The fact that the master is part owner has been held to make his acts not barratry,[107] but the better law seems to apply only to sole ownership.[108] But the fraudulent sale and purchase of a vessel by the master does not make him owner so far as barratrous acts are concerned.[109] The English rule, according to Mr. Arnould, turns upon the test (1) of the construction of the charter-party, and (2) whether at the time of loss the effectual and substantial control over the ship, master, and mariners is in the charterer for the purposes of the voyage, even though the master and mariners are in the pay and service generally of the general owner; and he adds, in most cases the question has been as to the charterer's liability to third parties or the general owner's lien for freight, and it is decided in effect, in cases noted by Mr. Arnould, that if an act which causes the loss is done by or with the privity of the general owner, and the owner for the voyage has no knowledge thereof and does not consent thereto, this is an act of barratry, even though the general owner hires and victuals the master and mariners.[110] A deviation is not barratrous un-

[103] Steinbach v. Ogden, 3 Caines (N. Y.), 1.

[104] Hobbs v. Hannam, 3 Camp. 93.

[105] Marcardier v. Chesapeake Ins. Co., 8 Cranch (U. S.), 39; 1 Wheat. (U. S.) 228, n.; Ross v. Hunter, 4 Term. Rep. 33. But see Vallejo v. Wheeler, Cowp. 143; Lofft. 645.

[106] Marcardier v. Chesapeake Ins. Co., 8 Cranch (U. S.) 39. See Soares v. Thornton, 7 Taunt. 627; 1 Moore, 373.

[107] Wilson v. General M. Ins. Co., 12 Cush. (Mass.) 360; 59 Am. Dec. 188; Harris v. Mercantile Ins. Co., 17 How. Pr. (N. Y.) 188.

[108] See section, "Barratry covers what."

[109] Steinbach v. Ogden, 3 Caines (N. Y.), 1.

[110] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *838; 2 Ar-

less accompanied with fraud or crime, or willfully done for the purpose of ultimately benefiting the master, or done for his own private purposes,[111] and a deviation compelled by a mutinous crew is not a deviation as to the master.[112]

§ **2745. Bilging—Marine Risk.**—If the ship is thrown upon her beam ends, and her seams are opened and water enters, but no plank or timber is broken, this is not "bilging" within the meaning of that term as used in a marine policy.[113] Damage caused by her bilging where a ship is placed in a dock for repairs, caused by her tackling giving away accidentally in being taken out of the dock, is recoverable under the general clause as to all other perils, etc., the cause of the loss being alleged in a special count.[114]

§ **2746. Birth of Issue.**—Bunyon mentions insurances of this character as existing in England in cases of companies specially authorized to effect such contracts, the principal elements upon which the insurance is based being the chances of having issue dependent upon age, health, and other circumstances. We shall not, however, treat of this subject, because the practice of insurances in this country does not warrant so doing.[115]

§ **2747. Breach of Promise of Third Party Does not Render Insurer Liable.**—The insurer is not liable for losses arising from a breach of promise by a third party.[116]

nould on Marine Insurance, Maclachlan's ed. 1887, 787; noting Vallejo v. Wheeler, Cowp. 143; Soares v. Thornton, 7 Taunt. 627.

[111] Earle v. Rowcroft, 8 East, 139, per Lord Ellenborough; Phyn v. Royal Exch. Co., 7 Term Rep. 505. And see cases on this point under section "Barratry covers what."

[112] See Scott v. Thompson, 1 Bos. & P. N. R. 186, per Sir James Mansfield; Vallejo v. Wheeler, Cowp. 154, per Lord Mansfield; Elton v. Brogden, 2 Strange, 1264.

[113] Ellery v. Merchants' Ins. Co., 3 Pick. (Mass.) 46.

[114] De Vaux v. Janson, 5 Bing. N. C. 519; Phillips v. Barber, 5 Barn. & Ald. 161.

[115] Bunyon on Life Insurance, 98.

[116] Parsons v. Massachusetts Ins. Co., 6 Mass. 197.

§ 2748. Capture or Seizure—Marine Risk.[117]—"Capture," as that word is used in marine policies,[118] involves, as the principal factor, the taking of the ship with intent to deprive the owner of her. This may be done in the act of war, or in a spirit of depredation by pirates, or by way of reprisals. It may be by a declared enemy lawfully commissioned and according to the laws of war, or by authority of a belligerent or of a de facto government recognized as a belligerent, and includes takings which are unlawful and unjustifiable by or contrary to the municipal laws of the country in which the contract is to be made and performed, and which are unlawful and unjustifiable by the fundamental and supreme law of the country of which the de facto government is actually a part. The term is sufficiently broad to comprehend every species of capture at sea; that is, every species of arrest, seizure, or detention which may lawfully be covered by the policy. Strictly speaking, however, a distinction exists between capture, properly so called, the object of which is to seize the vessel and cargo, and arrests and detentions, wherein the object is not to deprive the owner of her, but to take only contraband goods or enemies' effects on board of her. Another division is into just or unjust capture, or rather lawful and unlawful capture, the former being made by a declared enemy and according to the laws of war, and the latter being that made against the rules established by the law of nations. But whether a capture is just or unjust, lawful or unlawful, cannot avail the insurers as a defense, for they are responsible, without regard to such facts. And in so far as the word is capable of a double meaning, the true rule of exposition is said to be, in the absence of a contrary intent expressed, to interpret it as having been used by the parties in the fullest and most comprehensive sense.[119] A capture

[117] See secs. 2684-90, herein.

[118] The English policies use the words "taking at sea" among the risks assumed.

[119] Dole v. New England M. Ins. Co., 6 Allen (Mass.), per Bigelow, C. J.; Barney v. Maryland Ins. Co., 5 Har. & J. (Md.) 139; Levy v. Merrill, 4 Greenl. (Me.) 180; Monongahela Ins. Co. v. Chester, 43 Pa.

has also been held to include a mutinous seizure by passengers,[120] and a loss by an insurrection of slaves.[121] So a cap-

St. 491; Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch (U. S.) 29. See, also, secs. 2684-92, herein. That insurer liable whether capture lawful or unlawful, see Dole v. New England M. Ins. Co., cited above; Radliffe v. United Ins. Co., 7 Johns. (N. Y.) 38; Marsh v. Muir, 1 Brev. (S. C.) 134; Goss v. Withers, 2 Burr. 694, 695; Pollard v. Bell, 8 Term. Rep. 434; Powell v. Hyde, 5 El. & B. 607; 25 L. J. Q. B. 65; Bird v. Appleton, 8 Term Rep. 562; Price v. Bell, 1 East, 663. That it includes piracy, see Dole v. New England M. Ins. Co., cited above; Dean v. Hornby, 3 El. & B. 180; 23 L. J. Q. B. 129. Emerigon says a "capture is when one makes himself master of a ship in the act of war or in the spirit of depredation and with design to deprive the true owner of her"; that it includes taking or seizing by way of reprisals"; and he distinguishes "two kinds of captures, one of which the object is to seize, the other of which the object is to take only enemies' effects or contraband goods found on board. The first is an absolute capture, properly so called. The second appears, then, not to fall within the definition I have given of capture. . . . . We may distinguish, too, a just capture from an unjust one. A just capture is that which is made by a declared enemy according to the laws of war; Secundum jus gentium. Unjust capture is that which is made against the rules established by the law of nations. Whether a capture be just or unjust, the insurers are responsible." He also adds that it covers captures by friends or enemies, declared or not declared, "for whoever commits a depredation upon another is a pirate, and becomes an enemy": Emerigon on Insurance, Meredith's ed. 1850, c. xii, secs. 18, 27, 36, pp. 353, 412, 440; citing on last point Casaregis, Roccus, The Rota of Genoa, Scaccia, Valin, and Pothier. Mr. Marshall says: "Capture is when a ship is subdued and taken by an enemy in open war or by way of reprisals, or by a pirate, and with intent to deprive the owner of it. Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy or contraband goods which are on board. The former is a capture of the ship in the proper sense of the word; the latter is only an arrest and detention without any design to deprive the owner of it. Capture is deemed lawful when made by a declared enemy, lawfully commissioned and according to the laws of war, and unlawful when it is against the rules established by nations. But for every loss occasioned by capture, whether lawful or unlawful, the insurer is liable, the words of the policy being sufficiently comprehensive to include every species of capture to which ships at sea can ever be exposed": 1 Marshall on Insurance,

[120] Kleinwort v. Shepard, 1 El. & E. 447; 28 L. J. Q. B. 147; 5 Jur. (Mass.), 217.

[121] McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 202.

ture is included under a policy on risks "the same as those contained in all regular policies of insurance."[122] And the fact that the vessel is seized and condemned, although the acts are based on a mistake of fact, constitutes a "taking at sea."[123] It is a loss by capture and not a seizure in port, under a policy "no risk in port taken but sea risk," where the vessel is taken about two leagues from land and about four leagues from the port of destination, and the ship is there taken possession of by the captors, a prizemaster and crew being put on board.[124] Emerigon says that insurers are not liable for capture arrived through fault of the captain, unless they have made themselves guarantors against barratry of the master.[125] And in an English case the assured was permitted to recover a loss as for capture, though there might have been a recovery for barratry, it appearing that the master conspired with the captor to effect the capture.[126]

§ 2749. Cargo—Taking on Board Additional Cargo—Marine Risk.—Whether the insurers are discharged by reason of the vessel's taking on additional cargo depends upon whether there is a departure from the contract of insurance or from the voyage insured, rather than upon the point of increase of risk.[127] We have seen elsewhere that a general policy on goods covers such general goods of assured as are on

ed. 1810, *495. See, also, 3 Kent's Commentaries, 304; 2 Arnould on Marine Insurance, Perkins' ed. 1850, *808, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 761, et seq.; 1 Parsons on Insurance, ed. 1868, 575, et seq.

[122] Levy v. Merrill, 4 Greenl. (Me.) 180. Whether a capture is a loss by perils of the sea in case of a bottomry bond, see Appleton v. Crowninshield, 3 Mass. 443.

[123] Lozano v. Janson, 2 El. & E. 190; 28 L. J. Q. B. 337.

[124] Duval v. Commercial Ins. Co., 10 Johns. (N. Y.) 278. See, also, Levi v. Allnutt, 15 East, 267; Black v. Marine Ins. Co., 11 Johns. (N. Y.) 287.

[125] Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 18, p. 354.

[126] Archangelo v. Thompson, 2 Camp. 620.

[127] Maryland Ins. Co. v. Le Roy, 7 Cranch. (U. S.), 26, per Johnson, J. See chapter on Deviation.

board at the time of loss, and includes substituted goods; that is, shifting or successive cargoes.[128]

§ 2750. Carrier—Liability of Warehousemen—Conflict of Laws.—If warehousemen are required under an agreement with carriers to insure goods warehoused in good and solvent companies, this does not render such warehousemen insurers of the goods, but if under such agreement a compress company is to insure cotton deposited with it by carriers for compression, and it was customary for shippers to store their cotton with such company under permits from the carriers, the shippers being given bills of lading upon receipt of storage receipts issued by the company, said company is obligated to insure after the insurance of the bills of lading and so long as the cotton is held by it.[129] The consignees of goods residing in Boston contracted with a transportation company in New York for the carriage of the goods from New York to Boston, and the delivery to them at Boston. The defendant's connecting carriers residing at Massachusetts received the goods from the New York transportation company. On her arrival at Boston the goods were demanded but refused, because delivery was not then convenient, and the same afternoon they were unloaded and placed in defendant's warehouse, too late for delivery. The same night the warehouse and goods were burned up, and it was held that defendants were liable for the goods, although under Massachusetts decisions a railroad company under similar circumstances would not have been liable.[130]

§ 2751. Collision—Marine Risk—Generally.—Concerning collisions generally, in determining upon which vessel lies the fault of the collision the following points are important: 1. The character of the vessels, as whether the collision is between steamships or steam vessels, or between tugs, tows, and

[128] See chapters on description of property and subject matter; Hill v. Patten, 8 East, 377, per Lord Ellenborough; Tobin v. Hartford, 34 L. J. C. P. 37; 13 Com. B., N. S., 79.

[129] Lancaster Mills v. Merchants' Cotton Press etc. Co., 89 Tenn. 1; 14 S. W. Rep. 317.

[130] Falkner v. Hart, 82 N. Y. 413; 37 Am. Rep. 574.

canal-boats, or between steam and sailing vessels or steam vessels and small craft, or between sailing vessels; 2. The relative situation of the vessels, as whether one vessel is at anchor or at the pier, or both vessels are pursuing their respective courses, involving also the question of right of way; 3. The negligence or mistakes of one or both the vessels, involving the question of sudden change of course, the observance of the usual rules of navigation, and the requirements as to signals, lights, and lookouts; 4. The surrounding circumstances, such as the compelling force of the tides and of currents, the perils of the sea, imminent danger, fogs, the necessity of changing course in extremis, the locality, whether river, harbor, or entrance thereto or open sea, the time and the character of circumstances of navigation necessary, as well as the degree of speed with reference to the kind of vessel, and all the attending circumstances. The fault may be that solely of the injured vessel, or the injury may be occasioned by the fault of the other vessel, or both vessels may be in fault, or neither; as in this last case, where there is some extraneous compelling force or peril of the sea, or some extraordinary and some unavoidable accident occasioning the collision, upon the determination of which facts rests fixing the loss upon the proper party.[131] There is a collision, in an admiralty sense, within

[131] For cases covering these general points, see in 32 Federal Reports, The Hackensack, p. 800; The America, p. 845; The Ogemaw, p. 919. In 33 Federal Reports, The Alaska, pp. 107, 527; The Ada A. Kennedy, p. 623; The Osceola, p. 719; The Wm. Craft, p. 847, and other cases. In 34 Federal Reports, The Secancus, p. 68; The Martello, p. 71; The Manhasset, p. 408; The Frank P. Lee, p. 480; The Atlas, p. 543; The Britannia, p. 546; The Baltimore, p. 660; The Belle, p. 669; The City of Albany, p. 812; The St. Johns, p. 814; The John Cottrel, p. 907; The Pomona, p. 919, and other cases. In 35 Federal Reports, VanDyke v. The Bridgeport, p. 159; McCormick v. The Gladys, p. 160; The Eliza S. Pottor, p. 220; Union Ins. Co. v. The Bridgeport, pp. 222, 224; The City of Truro, p. 317; McAvoy v. The Mignon, p. 319; The Susquehanna, p. 320; Case v. The Susquehanna, p. 325; The Sammy, p. 327; The W. J. McCaldin, p. 330; The Gibson, p. 333; The Alaska, p. 555; The Morrisania, p. 558; The Osceola, p. 559; The City of New York, p. 604; The Baltimore, pp. 613, 614; The Nettie, p. 615; The Farragut, p. 617; The Drew, p. 789; Pomona, p. 921, and other cases. In 36 Federal Reports, The Ma-

the exception "free from particular average unless the vessel be . . . . in collision," even though the vessel is at rest and

rion W. Page. p. 329; The Sammie, p. 568; The Mary Powell, p. 598; Ocean S. S. Co. v. The Talisman, p. 600; the Mercedes, p. 602. and other cases. See, also, The Woodrop Sims, 2 Dod. Adm. 85, per Lord Stowell; The Sappho, 9 Jur. 960; Chappel v. Bradshaw (Md.). 13 Am. Rep. 50; Reeves v. Ship Constitution, Gill. (U. S.) 579; Tacoma Mill Co. v. The Blue Jacket, 3 Wash. Ter. 581; 19 Pac. Rep. 151; Philadelphia & Read. R. R. Co. v. Adams, 89 Pa. St. 31; 33 Am. Rep. 721; Hoffman v. Union Ferry Co., 47 N. Y. 176; 7 Am. Rep. 435; Austin v. New Jersey Steamboat Co., 43 N. Y. 75; 3 Am. Rep. 663; 2 Parsons on Contracts, 7th ed., 428, 435, *308, et seq. Emerigon says: "There are three kinds of collision: that which happens from casualty, that which happens by the fault of some one, and that which happens without it being possible to ascertain by whose fault": Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 14, p. 327, et seq. See Abbott on Shipping, 6th ed. 228, et seq.; 2 Arnould on Marine Insurance, Perkins' ed. 1850, *803, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 23, 24, n., 730, 756, 757, where the following language of Lord Stowell (in the Woodrop Sims, 2 Dod. Adm. 85) is quoted: "There are four possibilities under which a loss of this sort may occur: 1. It may happen without blame being imputable to either party, as where a loss is occasioned by a storm or by any other *vis major*; in that case the misfortunes must be borne by the party on whom it happens to light, the other not being responsible to him in any degree; 2. A misfortune of this kind may arise when both parties are to blame, where there has been a want of due diligence and skill on both sides; in such a case the rule of law is, that the loss must be apportioned between them as having been occasioned by the fault of both; 3. It may happen by the misconduct of the suffering party alone; and then the rule is, that the sufferer must bear his own burden; 4. It may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to an entire compensation from the other." And see upon these several points the cases above noted in the 32d, 33d, 34th, 35th, and 36th Federal Reports. As to entrance into New York harbor and international rules of navigation, see The Excelsior, 33 Fed. Rep. 554. See Marsden's Law of Collisions at Sea, ed. 1880, containing extracts from the Merchants' Shipping Acts, International Register of 1863 and 1880, and local rules for the Thames, etc.; The "collision clause" article criticising Xenos v. Fox, 46 Law Times 125. *Collision.*—As to navigation on harbors, lakes, and inland waters and navigation on great lakes, as affected by International Rules of 1885 and Revised Statutes, section 4233, see The North Star, 10 U. S. C. C. A. 262; 62 Fed. Rep. 71. Where sufficient officers and crew on deck when collision impending to perform all necessary duties more need not be there: La Normandie, 7 U. S. C. C. A. 285; 58 Fed. Rep. 427. Sailing vessel with

moored when she is run into, and the same effect should be given the particular average clause whether the case is one of stranding or collision.[132]

efficient fog horn, when not in fault for collision in fog, the horn having become disabled: The Trave, 15 U. S. C. C. A. 485; 68 Fed. Rep. 390. When tug, colliding with overtaking ferryboat by being swept against it by current and having incompetent wheelmen, is in fault: Long Island R. Co. v. Killieu, 14 U. S. C. C. A. 418; 67 Fed. Rep. 365. As to the degree of skill required of a towing vessel, see The S. S. Wilhelm, 16 U. S. A. 356. Obligation of steamer to reduce speed on entering fog bank and neglect to do so puts fault on her for collision: The Saale, 11 U. S. C. C. A. 302; 63 Fed. Rep. 478; affirming 59 Fed. Rep. 716. Where fault of one vessel is greater than that of the other, both being in fault, the degree of fault of each measures the liability: The Victory, 15 U. S. C. C. A. 490; 68 Fed. Rep. 395. *Collision.*—As to loading cargo from lighter when ship not liable for the loss: New York Lighterage & T. Co. v. The Hogarth, 17 U. S. C. C. A. 470; 70 Fed. Rep. 872. Cargo owners not responsible for fault of vessel in colliding: The Victory, 15 U. S. C. C. A. 490; 68 Fed. Rep. 395. Steamer and schooner meeting at night in open sea, when steamer in fault for collision in not allowing sufficient margin for passing: Henderson v. The City of St. Augustine, 15 U. S. C. C. A. 488; 68 Fed. Rep. 393; affirming 52 Fed. Rep. 237. Collision of tug and sailing vessel, burden of proof on steamer as to fault of other vessel: Bigelow v. Nickerson, 17 U. S. C. C. A. 1; 70 Fed. Rep. 113. Failure of sailing vessel to show torchlight when meeting steamer, when immaterial: Bigelow v. Nickerson, 17 U. S. C. C. A. 1; 70 Fed. Rep. 113. Vessel moored at wharf, Revised Statutes, section 4233, rule 12, requiring light, when not applicable: Denty v. The Martin Dallman, 17 U. S. C. C. A. 419; 70 Fed. Rep. 797. Absence of green light, when immaterial: The Robert Graham Dun, 17 U. S. C. C. A. 419; 70 Fed. Rep. 270; affirming 63 Fed. Rep. 167. When tug colliding with anchored vessel is solely in fault: The P. I. Nevins, 14 U. S. C. C. A. 355; 67 Fed. Rep. 158. Where tug and vessel anchored outside boundaries prescribed by regulations of secretary of navy, both held in fault, for sinking of vessel in tow: Riley v. The Richmond, 12 U. S. C. C. A. 1; 63 Fed. Rep. 1020. Collision between propeller and tug, case where both in fault in keeping too near piers and want of vigilant lookout, failure of tug in not keeping head to tide in crossing propeller's bows: The Amos C. Barstow, 13 U. S. C. C. A. 515; 66 Fed. Rep. 366. When vessels navigating Hudson unduly encroach upon rights of ferryboats by

[132] London Assurance v. Companhia De Moagens Do Barriero, 15 U. S. C. C. A. 379; 68 Fed. Rep. 247; citing The Granite State, 3 Wall. (U. S.) 310; 1 Parsons on Marine Insurance, 632; Harman v. Vaux, ... 429, per Lord Ellenborough, C. J.; Roux v. Salvador, 1 Bing. N. C. 526; Insurance Co. v. Pitts (1893), 1 L. R. Q. B. 476.

§ **2752. Collision Continued—Cases.**—A loss by collision without any fault on either side is a loss by perils of the sea.[133] So also where the collision results through the gross negligence of the other vessel,[134] or where the insured vessel is injured by collision, whether her own crew have been vigilant or careless.[135] If a vessel insured against collision with any object but not against perils of the sea runs against a snag and springs a leak, which is temporarily repaired, and while being towed into port for repairs the leak is so far enlarged by the motion through the water that she begins to sink and is run aground and abandoned, the insurers are liable for a loss of the ship under the collision clause.[136] A steamboat going west through Hellgate with the flood tide may without

keeping too near ends of piers: The Princeton, 14 U. S. C. C. A. 527; 67 Fed. Rep. 557. Ferryboat colliding with boat in tow of tug lying near pier and holding herself against ebb-tide: ferryboat in fault: Cornell Steamboat Co. v. The Jersey City, 2 U. S. C. C. A. 365; 51 Fed. Rep. 527; affirming 44 Fed. Rep. 112. Small steamer moored at private wharf struck by large river steamer while landing, latter in fault: The John C. Fisher, 1 U. S. C. C. A. 624; 50 Fed. Rep. 703. Steamer colliding with yacht moored at wharf, steamer liable: The Elberon, 17 U. S. C. C. A. 357; 70 Fed. Rep. 720. Schooner tacking unnecessarily across steamer's bow in narrow channel, steamer not in fault: The Philadelphian, 10 U. S. C. C. A. 127; 61 Fed. Rep. 862. Collision between sailing vessels, one sailing free and the other close hauled, change of course: The Robert Graham Dun, 17 U. S. C. C. A. 90; 70 Fed. Rep. 270; affirming 63 Fed. Rep. 167. Change of course, imminent danger, sailing vessel: Bigelow v. Nickerson, 17 U. S. C. C. A. 1; 70 Fed. Rep. 113. Harbors and navigable coast waters connecting directly with the ocean are within International Rules of 1885, article 21, requiring steamers to keep to starboard side. See Rev. Stats., sec. 4233: The Victory, 15 U. S. C. C. A. 490; 68 Fed. Rep. 395; affirming 63 Fed. Rep. 631; The Britannia, 153 U. S. 130; 14 Sup. Ct. Rep. 795; The John King, 1 U. S. C. C. A. 323; 49 Fed. Rep. 469. Collision, when due to inevitable accident from breaking of steamer's tiller rope, and not from steamer's fault: The Olympia, 9 U. S. C. C. A. 393; 61 Fed. Rep. 120.

[133] Peters v. Warren Ins. Co., 14 Pet. (U. S.) 99; 3 Sum. (U. S.) 389; Butler v. Fisher, 3 Esp. 67.

[134] Smith v. Scott, 4 Taunt. 126.

[135] Butler v. Fisher, 3 Esp. 67; Matthews v. Howard Ins. Co., 11 N. Y. 1, per Denio, J.; Street v. Augusta Ins. Co., 12 Rich. (S. C.) 13; Hale v. Washington Ins. Co., 2 Story (C. C.), 176, 184.

[136] Reicher v. Borwick (Eng. C. A. 1894), 2 Q. B. D. L. R. 548.

fault take the east channel after one whistle to a tug going up that channel, and where the latter loses one boat of her tow by collision, owing to her failure to go to the starboard side, she having answered the steamer's one whistle with one whistle, the tug is in fault.[137] If a vessel is anchored at the proper place where boats are usually anchored, or is lying on well-known anchorage ground out of the regular course of vessels, and where it may reasonably be expected that vessels are liable to be lying, steamboats or tugs with tows are in fault for collision, and liable for damage to the anchored vessel.[138] Under a warranty to be free of particular average unless the vessel be in collision, the term "collision" covers loss by a breaking in the ship's bulwarks, caused by her being struck by a scow on her return to dock because of trouble with her engine after she, being fully loaded, has cast off her moorings, and in such case the saving force to the insurers of the exception ceases to operate at once the collision takes place, without regard to the fact whether the subsequent loss arises from the collision or not.[139] A loss by fire caused by a collision is held to be covered by a policy insuring against fire except fire arising from certain causes, collision not being excepted, although such a policy does not cover loss from collision.[140]

§ 2753. Collision with "Piers or Stages or Other Structures," when not Stranding.—Under a collision contract of reinsurance "against risk or loss or damage through collision with any other ship . . . . or piers or stages or similar structures," the vessels during a heavy gale struck and were wrecked on the toe of the breakwater of Holyhead harbor, being driven by the force of the wind and sea against a sloping bank or mound called the toe of said breakwater while endeav-

[137] Union Ins. Co. v. The Bridgeport, 35 Fed. Rep. 222, 224.

[138] Orison v. The Syracuse, 35 Fed. Rep. 367; The Drew, 35 Fed. Rep. 789. See The Mary Powell, 36 Fed. Rep. 598; The Nettie, 35 Fed. Rep. 615.

[139] The Liscard Companhia De Moagens Do Barriero v. London Assur. Co. etc., 56 Fed. Rep. 44.

[140] Insurance Co. v. Transportation Co., 12 Wall. (U. S.) 194; Germania v. Sherlock, 25 Ohio St. 33.

oring to clear its end, it being made by a deposit of a number of large boulders forming said toe, behind which the wall of the breakwater was built. The vessels were totally lost, and the underwriter having paid therefor, sought recovery under this reinsurance, and it was held that the loss was by collision, and not by stranding; that the words "pier," "breakwater," and "toe" all denoted one and the same structure, within the expression "piers or stages or similar structures"; that "striking against" and "collision" could not be distinguished; that it was not necessary to constitute a collision that the upper works of the ship must strike some one of the things referred to in said clause, and it was none the less a collision because the keels of the vessels struck the toe, and therefore a recovery could be had.[141]

§ 2754. Collision Continued—Damage to Other Vessel. Peters v. Warren Insurance Company,[142] decides that a loss by collision without fault on either side is a loss by perils of the sea. It therefore involves the discussion of the principles underlying proximate and remote cause. The facts were briefly these: By the law of a foreign port, to the operation of which the vessel insured was subjected at the time of accidental collision, it was decreed that the collision was not the result of carelessness on either side, and the loss was a general average to be borne equally by both parties, and by the apportionment assured was obligated to pay two thousand six hundred dollars in satisfaction of the decree. The opinion of the supreme court, sustaining Mr. Justice Story, was unanimous that the collision was the proximate cause of the loss, and the contribution not the cause, but a consequence, and that the insurers were liable for the amount so paid. The doctrine of this case is directly contrary to the decision given by Lord Dunham, C. J., in an English case shortly prior thereto, where the owner endeavored to recover as for a particular average

[141] Union M. Ins. Co. v. Borwick (1895), 2 L. R. Q. B. D. 279, 281, per Matthew, J.

[142] 1 Story (C. C.), 463; 3 Sum. (C. C.) 389; affirmed 14 Pet. (U. S.) 99.

loss as by perils of the sea, under substantially the same facts, or at least so far the same that the cases may be considered as resting on the same basis. The English decision holds that the insurers were not liable for the excess, as the obligation to pay was not a necessary or proximate effect of the perils of the sea.[143] In line with the decision of the United States supreme court are other cases and authority of great weight,[144] while the doctrine of the English case seems to be that now in force in England.[145] And the latter is the doctrine favored here by such writers of authority as Mr. Phillips[146] and Mr. Parsons.[147] It will be seen upon examination of the decisions that in the cases other than that of Peters v. Warren Insurance Company, first above noted, the insured was obligated to pay the damage, on the ground of negligence or fault of the officers and crew of the insured vessel. But the negligence or the collision must be the proximate cause of the loss, and the collision being the proximate cause it is a loss for which insurers are liable, and neither the damages or amount of contribution can be the proximate cause, but must be a direct legal consequence of the peril. If a peril insured against causes the loss, and the remote cause is the negligence of the master and crew, the underwriters are nevertheless liable, without regard to the fact whether or not the policy covers barratry; there-

[143] De Vaux v. Salvador, 4 Ad. & E. 420; 6 Nev. & M. 713; 5 L. J. N. S., K. B. 134. But see Heard v. Holman, 11 Jur., N. S., 544; 12 L. T., N. S., 455.

[144] Nelson v. Suffolk Ins. Co., 8 Cush. (Mass.) 477; 54 Am. Dec. 770; Blanchard v. Equitable etc. Ins. Co., 12 Allen (Mass.), 386; Walker v. Boston Ins. Co., 14 Gray (Mass.), 288; Hale v. Washington Ins. Co., 2 Story (C. C.), 176; denied in General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351; reversing 1 Blatchf. (C. C.) 251. But see Street v. Augusta Ins. Co., 12 Rich. L. (S. C.) 13; 75 Am. Dec. 714; Matthews v. Howard Ins. Co., 11 N. Y. 9; reversing 13 Barb. 234; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351; reversing 1 Blatchf. 251.

[145] 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 24; 2 Arnould on Marine Insurance, 729, 730. Examine, also, 2 Arnould on Marine Insurance, Perkins' ed. 1850, *800, *806; Judicature Act, 36 & 37 Vict., c, 66, sec. 25, subsec. 9.

[146] 2 Phillips on Insurance, 3d ed. 66, 170, et seq., 177, et seq., 201; secs. 1137, 1272, 1416, 1436.

[147] 1 Parsons on Marine Insurance, ed. 1868, 551, et seq., 554.

fore, the question of negligence ought to be eliminated.[148] Again, such damages or amount of contribution may be fairly considered as incident to a peril insured against, attributed thereto, and falling as a legal consequence thereof.[149] And the assertion of the principle in Peters v. Warren Insurance Company[150] seems most reasonable that, if the thing insured becomes by law directly chargeable with any expense, contribution, or loss, in consequence of a particular peril, then that peril is the cause of such expense.[151] But a case of this kind is to be distinguished from that where a ship damaged by collision seeks port for repairs, and in discharging and reshipping the goods for that purpose they are damaged by the necessary handling and by the delay. In such case the collision cannot be considered the proximate cause of the damage to the goods by said handling and delay.[152]

§ 2755. Collision—Running Down Clause—The liability of the insurers under what is known as the "running down clause" will depend largely upon the exact terms used. It generally provides for the payment by the insurers of a specified proportionate sum, usually three-fourths, which the insured shall become liable to pay, and shall pay, for damages or injuries sustained by another ship by collision through accident or negligence with the insured vessel; and where a vessel, having collided with another, was sold under a decree of admiralty to pay the damage and proceeds of her sale, and the amount paid was two thousand one hundred pounds, the vessel being sold for less than her value, which was three thousand pounds, it was held that under such a clause as the above, insur-

[148] Natchez Ins. Co. v. Stanton, 10 Miss. (2 Smedes & M.) 340; Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213; 1 McLean, 279; Walker v. Maitland, 5 Barn. & Ald. 171.

[149] See McCargo v. New Orleans etc. Co., 10 Rob. (La.) 202; 43 Am. Dec. 180, as to consequences incident to perils insured against. See, also, Magoun v. New England M. Ins. Co., 1 Story (C. C.), 157; Perry v. Ohio Ins. Co., 5 Ohio, 305.

[150] 14 Pet. (U. S.) 99.

[151] See 3 Kent's Commentaries, 301, n.

[152] Pink v. Fleming (C. A.), L. R. 25; Q. B. D. 396. See Emery v. Huntington, 109 Mass. 431; 12 Am. Rep. 725.

ers were only liable for three-fourths of the two thousand one hundred pounds.[153] And under a clause so providing it is also held where shipowners had not paid over to the other ship half the amount of the damage sustained by collision, but had only allowed it on account by deducting it from half the amount of damage to their own ship, this was not a sum which the owners had become liable to pay and had paid[153a] nor, so it is held, does it cover demands for personal injuries.[154] But where a vessel is collided with and sunk by a tug having a ship in tow, and both the tug and tow are found liable in damages therefor, the tow may recover the same from the insurers under a like clause as the above, even though the tow herself was not directly in collision.[155] Again, where under this clause the insured is sued for damages for a collision, but successfully defends and obtains judgment, the insurers are not liable for expenses of defending the claim.[156]

§ 2756. **Confounding of Goods by Breaking Open of Packages, etc.—Marine Risk.**—If by a peril of the sea

[153] Thompson v. Reynolds, 26 L. J. Q. B. 93; 7 El. & B. 172; 3 Jur., N. S., 464.

[153a] London S. S. Owners v. Grampian S. S. Co., L. R. 24 Q. B. D. 32.

[154] Taylor v. Dewar, 5 B. & S. 58; 33 L. J. Q. B. 141; 10 Jur., N. S., 361. But see Coey v. Smith, 22 Ct. Sess. Cas. N. S., 955.

[155] McCowan v. Blaine (H. of L. Eng. 1891), App. Cas. 401; 28 Scot. L. R. 943; 17 Ct. Sess. Cas. (S. C.) 1061, Lord Bramwell dissenting. It was said in this case that the clause ought to cover all damages consequent upon an actual collision for which assured is liable, and that the court could not adopt a construction which would narrow the meaning of the term "collision" to direct contact between the two hulls or some part of the ship's structure, but that the clause extended to injuries caused by the impact of the hull of the insured ship or of her boats or steam launch, even though the latter were not insured as parts of the ship, and that the words also covered an indirect collision, such as the driving of another vessel by impact therewith against the injured ship, or if a tug were towing barges and a barge were driven against any other vessel owing to the improper navigation of the tug, thereby causing damage to the other vessel, that the insurers would be liable, even though there had been no impact of the tug itself with the injured ship: Id., per Lord Selborne.

[156] Xenos v. Fox, 4 L. R. C. P. 665; affirming 3 L. R. C. P. 630; 38 L. J. C. P. 351.

bales, packages, etc., containing goods of the same character but having distinctive marks of ownership are so disturbed as to break open, and the goods are so scattered and confounded that the several ownerships are indistinguishable, this is not of itself a loss at the charge of the insurers where the goods still retain, although commingled, the form and substance of that particular kind of merchandise, as in the case of cotton, and there still remains in the several owners their proportionate ownership in the whole property.[157]

§ 2757. **Contingent Liability of Insurer—Carrier—Construction of Policy.**—If the policy provides that in case goods insured are lost, damaged, or destroyed while in care of a common carrier the insurer shall advance the assured an amount equivalent to the insured value of the goods, pending an investigation and determination whether the carrier is liable for the loss at common law, and, if the carrier is liable, then such amount as shall be received from the carrier is to be paid the company in discharge of said advance, and the bill of lading to the carrier provides that it shall have the full benefit of any insurance on the goods, the policy is in effect a provision for contingent liability of the insurer, who is liable, if the carrier is not; and if the carrier be found liable, the money paid by the insurer will be held simply as an advance pending the determination of the point of liability of the insurer, or carrier, and the latter has no right to insurance money.[158]

§ 2758. **Conversion—Recovery and Disposal of Property by Underwriter.**—If the policy makes it incumbent upon the underwriter in case of loss to recover, save, and dispose of the insured property for the benefit of all concerned, he has the right of possession where a loss occurs, and cannot be held liable for a conversion in so taking and disposing of the property.[159]

[157] So held in Spence v. Union M. Ins. Co., L. R. 3 C. P. 427.

[158] Gulf C. & S. F. Ry. Co. v. Zimmerman, 81 Tex. 605; 17 S. W. Rep. 239.

[159] Schuyler v. Phœnix Ins. Co., 56 Hun (N. Y.), 493; 31 N. Y. St.

§ **2759. Decayed, Rotten, etc.—Marine Risks.**—If articles of merchandise, decayed, rotten, or otherwise, are damaged by reason of the intrinsic nature or proper or inherent vice of the article, and it appears that the loss was so occasioned, the insurer is not liable therefor except he so stipulates.[160] If a vessel is old and decayed, but nevertheless her condition is such that she may be run for some time, the insurer is not obligated to make good that which is decayed and rotten unless she sustains a loss by a peril insured against, which is of such a nature that repairs cannot be made so that the decayed and rotten parts may be used as before the accident.[161]

§ **2760. Delay in Voyage.**—The insurers guarantee only the safe arrival of goods. They do not guarantee speedy arrival nor arrival in time for an advantageous market, nor do they incur loss from delay in the voyage, unless the delay is produced by peril insured against or the cargo be subject to deterioration by mere lapse of time;[162] and in case of an insurance on passage money the insurers do not contract that the vessel shall deliver her passengers within a given time.[163] Nor does an insurer on freight guarantee that it shall be earned in any stated time, and is not liable under an insurance of freight for loss thereof earned by detention of the ship by

Rep. 659; 10 N. Y. Supp. 205; affirmed, 32 N. E. Rep. 25; 22 Ins. L. J. 150; 48 N. Y. St. Rep. 213 (two judges dissenting).

[160] Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 9, who says: "Losses proceeding from the proper vice of the subject and its intrinsic nature, ex vitio rei et intrinseca ejus natura, are not at the charge of the insurers": Taylor v. Dunbar, L. R. 4 C. P. 206; Boyd v. Dubois, 3 Camp. 132; 1 Phillips on Insurance, 3d ed., 618, sec. 1089.

[161] Hyde v. Louisiana State Ins. Co., 14 Mart. (La.) 410, per Porter, J.

[162] Salisbury v. Marine Ins. Co., 23 Mo. 553; 66 Am. Dec. 687. See Bradford v. Levy, Ryan & M. 331; Tatham v. Hodgson, 6 Term Rep. 656.

[163] Howard v. Astor Mut. Ins. Co., 5 Bosw. (N. Y.) 38. See Marks v. Nashville M. & F. Ins. Co., 6 La. Ann. 126; Willis v. Cooke, 5 El. & B. 641; 25 L. J. Q. B. 16, and examine Gibson v. Bradford, 24 L. J. Q. B. 159; 4 El. & B. 586.

sea perils. It is sufficient that the freight be earned.[164] Under a policy "at and from" a foreign port unreasonable delay in commencing the voyage after making the policy, whereby the risk is materially varied, avoids the contract.[165] We have already considered the question of delay in connection with deviation, as well as what is reasonable and unreasonable delay, justified or not justified by the purposes of the voyage.

§ **2761. Electrical Machinery and Fixtures—Electric Lighting—Fire Risk—Knowledge of Insurers.**—If a building and the electrical machinery and fixtures therein used for generating and transmitting electricity for electric lighting are insured against loss by fire, it will be assumed that the insurers in making the contract did so with a knowledge of the purposes for which the machinery was used, and that they understood at the time that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must also be presumed to have contemplated the effects which fire would naturally produce in connection with the electrical machinery and apparatus used. Therefore, where a fire in a remote part of the building caused a circuit, whereby there was an increase of electric current brought into the dynamo, producing a resistance which being transmitted to other machinery caused a strain and a breaking to pieces of the same and other injuries, the insurers were held liable.[166]

§ **2762. Embargo, what Constitutes.**—An embargo, as already briefly noted, is within the clause as to "arrests, restraints, detainments," etc. Although a war measure is used generally in time of war, or to avert threatened hostilities under a power vested in the government, it is nevertheless also a

[164] Mayo v. Maine F. & M. Ins. Co., 4 Mass. 374. See McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Everth v. Smith, 2 Maule & S. 278.

[165] De Wolf v. Archangel M. B. & Ins. Co., L. R. 9 Q. B. 451; Mount v. Larkins, 8 Bing. 108.

[166] Lynn Gas & Electric Co. v. Meriden Fire Ins. Co. etc., 158 Mass. 570; 33 N. E. Rep. 690.

commercial measure, having for its avowed object the protection of commerce and the avoiding of war. It may prohibit the departure of ships or particular vessels or goods from any or all ports of the country. It may be imposed for the purpose of facilitating or manning of a fleet, or to conceal the progress of an expedition intending to sail from a particular port, in which and like cases it is a military instrument, and partakes of the nature of war. It springs from temporary causes, may be limited to a certain period, or may be indefinite as to time. Emerigon says the word in Spanish signifies seizure and sequestration, but is taken there in France "for a general prohibition to let any vessel go out of port until a new order." It is generally construed as a mere suspension, and not as a condemnation of trade.[167]

§ **2763. Embargo—Effect upon Charter-party.**—It is held that a detention or embargo does not break up the voyage under a charter-party,nor determine a contract of affreightment and that the voyage must be prosecuted after the embargo is removed.[168]

§ **2764. Embargo—Domestic and Foreign.**—Under a general policy a domestic embargo equally with a foreign one is

[167] Gibbons v. Ogden, 9 Wheat. (U. S.) 1, per Marshall, C. J.; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 312; 2 Marshall on Insurance, ed. 1810, 508a; Emerigon on Insurance, Meredith's ed. 1850, c. xii, secs. 30, 31, pp. 420, 425, et seq.; 3 Story's Commentaries, 340, 346; 2 Arnould on Marine Insurance, Perkins' ed. 1850, *814; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 766; Blackstone's Commentaries, 270; 1 Kent's Commentaries, 5th ed., 281, sec. 13. "An interdiction of trade is not always the result of a general permanent law. It is not infrequently a temporary restraint, having no relation to commerce or revenue, but imposed or enacted with a sole view to political objects. Such is the character of an embargo, general or special—a prohibition of the departure of all or of particular vessels from all or some of the ports of the country in which it is laid. This prohibition, whether limited to a certain period or indefinite as to time, as it springs wholly from temporary causes, is always regarded as temporary in its nature. Hence, it is construed as a mere suspension of the trade that it prohibits, not as a condemnation of the trade as in itself unlawful; and this distinction has in some cases important effect upon the construction of the policy": 1 Duer on Marine Insurance, ed. 1845, 350, 351, sec. 39.

[168] Hadley v. Clarke, 8 Term Rep. 259.

a peril insured against, and is an arrest, restraint, or detainment; for an insured may be indemnified against acts of his own government where it is not the object of the policy to violate the law, or where the loss does not arise from assured's violation of the law. An insurance against loss from an embargo which the government of the parties may impose in the future is not against the policy of the law, and is valid.[169] If the insurance be upon a neutral ship "at and from" an enemy's port, and an embargo is there laid, the assured may give notice of abandonment. It is covered by the clause as to arrests, etc., and if the embargo continue, there may be an abandonment and recovery as for a total loss.[170]

§ 2765. Embargo—Acts of Foreign Assured's Own Government.—Some question has arisen whether, where the assured is a foreigner, he can be indemnified as to acts of his own government. It is declared to be the law that an insured foreigner cannot be indemnified against the hostile acts of his own government.[171] But there is a distinction between an embargo in times of peace between the countries of assured and assurer and an embargo laid by reason of existing or threatened hostilities.[172] In this country the rule seems to be that an embargo by the government of a foreign assured is as much within the contemplation of the contract as any other embargo, and that an innocent assured cannot be held a party to the peaceful legislative acts of his own government, or to have such an actual participation therein as to be precluded thereby from seeking a remedy under a policy effected with

[169] Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 312; McFee v. South Carolina Ins. Co., 2 McCord (S. C.) 503; Lorent v. South Carolina Ins. Co., 1 Nott. & McC. (S. C.) 505; Green v. Young, 2 Ld. Raym. 840; Salk. 444; Anonymous, 2 Salk. 448; Hagedorn v. Whitmore, 3 Bos. & P. 302; Touteng v. Hubbard, 3 Bos. & P. 302.

[170] Rotch v. Edie, 6 Term Rep. 413, 425, also reported in 2 Marshall on Insurance, ed. 1810, 511a. See Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404, per Sutherland, J.

[171] Touteng v. Hubbard, 3 Bos. & P. 302, per Lord Alvanley, C. J.; Glasier v. Cowie, 1 Maule & S. 54; Lubbard v. Potts, 7 East, 449, per Lord Ellenborough; Eden v. Parkinson, Doug. 732; Barker v. Blakes, 9 East, 283; Thelluson v. Ferguson, 1 Doug. 346. See c. xi, herein.

[172] Aubert v. Gray, 32 L. J. Q. B. 50; 3 Best. & S. 163.

an underwriter here; provided, however, there is no intentional violation by assured or his agents of the laws of his own country, and perhaps if the case is such as to give rise to a fair presumption that the risk was not contemplated by the parties, the presumption should be overcome by proof. The above conclusions are at least fairly deducible from the authorities cited below. The English rule is thus stated by Mr. Maclachlan: "The assured is not to be identified with the acts of his own government unless the existence of hostilities between it and the government of the insurer renders any such contract of indemnity incompatible with that highest law—salus populi—under the insurer's government," which is less restricted than Mr. Arnould's rule, and more in accord with that believed to exist in this country.[173]

§ **2766. Employee's Fidelity.**—The principles underlying this contract involve the obligations and liabilities of sureties, and we have noted briefly, in addition to such cases as are strictly those of insurance, several important decisions concerning sureties involving principles analogous to those applicable to contracts of insurance of this character, and have given illustrative cases rather than rules. It is not necessary that there should have actually been a misapplication of money for himself by a clerk to render a surety liable on a bond for the faithful performance by the clerk of his duty, for if the employee aids another in defaulting, the sureties are liable.[174] If the policy stipulates that the assured shall within a specified number of days after discovery of any fraud or dishonesty of the employee, and any matter in respect to which any claim is intended to

[173] Francis v. Ocean Ins., 6 Cow. (N. Y.) 404, per Sutherland, C. J.; McBride v. Marine Ins. Co., 5 Johns. (N. Y.), per Kent, C. J.; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 320, per Washington, J. See 1 Duer on Marine Insurance, ed. 1845, 352, 353; 2 Duer on Marine Insurance, ed. 1846, 589-96, where the English rule and that in this country and the cases under the rules are fully discussed; note to 2 Marshall on Insurance, ed. 1810, 508 b, 509 b, where Park on Insurance, 6th ed. 609-14, is quoted at length; 1 Phillips on Insurance, 3d ed., 494, et seq., secs. 913-15, 1060; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 779, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 737, 738.

[174] London Bright and S. C. R. Co. v. Goodwin, 3 Exch. 736.

be made, notify the society at its office in writing, stating as far as the case will permit all the particulars thereof, and that the guarantee shall end as to all future acts of frauds and dishonesty by the employee after discovery thereof, such conditions refer only to claims intended to be made, and concerning acts of fraud or dishonesty which may be the foundation of a claim against the insurers,[175] and insurers are liable under a guarantee of fidelity and diligence in duty of a clerk for a loss of money, owing to the negligence of said employee in leaving a large sum of money exposed in his room while absent at lunch.[176] If the policy contains as a condition precedent a stipulation that the employer shall, at the company's request, use all diligence in prosecuting the employee to conviction of any fraud or dishonesty, the expense thereof to be borne by the insurer in case of conviction, the failure on the company's request to prosecute an employee for embezzlement precludes a recovery.[177] In the construction of bonds for the faithful performance of duties or obligations reference should be had to the hazards against which security is sought, as well as to the situation of the parties, the principal as well as the surety, and also the character of the employment or trust.[178] But fraud of the principal in misleading a surety as to the character and extent of the obligation signed and assumed constitutes no defense against the payee or obligee where it does not appear that the latter had knowledge thereof or participated therein.[179] One who at the request of the principal, and without the knowledge of the obligee, signs a bond for the principal's conduct as an insurance agent is not released by the principal's previous neglect in the same employment to make payments promptly which were subsequently made good, nor by the obligee's continuing him in his employment after such default, and if the surety allows his name to remain without protest after learning of such default, he is liable in future.[180]

[175] Byrne v. Muzio, 8 L. R. (Ir.) 396.

[176] In re Citizens' Ins. Co., 16 Can. L. J. Q. B. 334 (Quebec).

[177] London Guarantee Co. v. Fearnley, 5 App. Cas. 911 (the lord chancellor dissenting).

[178] Rochester City Bank v. Elwood, 21 N. Y. (7 Smith) 88.

[179] Lucas v. Owens, 113 Ind. 521; 16 N. E. Rep. 196.

[180] Home Ins. Co. v. Holway, 55 Iowa, 571; 39 Am. Rep. 179.

Again, a bond was executed for the faithful performance of duty by an "assistant clerk" in a bank. He was employed as a messenger. Afterward, he was promoted to the next higher clerkship, and still later to the position of book-keeper. In the last position he was stationed near the money-drawer, and from time to time abstracted money from it and made false entries to conceal his crime. The last promotion was without the knowledge of his sureties on the bond, and it was held that they were not liable for the embezzlement.[181] A surety on the bond of a re-elected county treasurer is liable only for default during the term for which the bond was given.[182] So where the office of a town treasurer is an annual one, sureties are not liable on his official bond for misappropriations of money made after the expiration of the official year and before the successor qualifies.[183] The sureties on the second term of a bond of a treasurer must, in order to release themselves, show that a deficiency occurred during a former term.[184] Concerning the question of negligence, the following cases are important: In a suit against a cashier of a bank and his sureties on their bond, where the defendants pleaded, severally, it is no defense to the suit that the directors have been negligent in examining his account where the negligence occurred after the bond was executed, nor that, prior to the execution of the bond, the cashier had lost money by gambling, such fact not relating to the business which was the subject of suretyship. To avoid the bond on the ground of fraud on the part of the bank or its directors there must be a fraudulent concealment of something material for the sureties to know.[185] In another

[181] Manufacturers' Nat. Bank of Newark v. Dickerson, 12 Vroom (N. J.), 448; 32 Am. Rep. 237.

[182] Van Sickel v. County of Buffalo, 13 Neb. 103; 42 Am. Rep. 753. See Territory v. Cooke (Ariz.), 17 Pac. Rep. 10; County of Lauderdale v. Alford, 65 Miss. 63; 3 S. Rep. 246.

[183] Norridgewock v. Hale, 80 Me. 362; 14 Atl. Rep. 943. See Bigelow v. Bridge, 8 Mass. 275; State v. Powell, 40 La. Ann. 241; 4 S. Rep. 447; South Carolina Soc. v. Johnson, 1 McCord (S. C.) 41.

[184] Pine County v. Willard, 39 Minn. 125; 39 N. W. Rep. 71; Roper v. Sangamon Lodge, 91 Ill. 518; 33 Am. Rep. 60. See Crawn v. Commonwealth, 84 Va. 282; 4 S. E. Rep. 721.

[185] Atlas Bank v. Brownell, 9 R. I. 168; 11 Am. Rep. 231; cited in note to Thompson's Bank Cases, 614. See Bank of United States v. Etting, 11 Wheat. (U. S.) 59.

case, however, it appeared that before the delivery and acceptance of the bond of a cashier, and before the sureties had become guarantees for his diligence, honesty, and fidelity, the directors of the bank had published a statement under the provisions of the law of its organization, whereby the affairs of the bank appeared to be well managed and prudently and honestly administered, and which was intended to and did convey the belief that the cashier had up to that time acted as a trustworthy person, and the sureties were induced in consequence thereof to assume the bond obligation. The cashier was, in fact, a defaulter at the time, and the directors by the use of slight care might have learned this fact. An action was brought upon the bond for subsequent embezzlements, and the court refused a recovery against them. The court, however, declared that the sureties could not claim immunity upon account of any report made after they became sureties, the reports being sworn to by the cashier. It was said that it could be assumed that upon his representations and upon what appeared upon the books of the association the directors were induced to certify to their accuracy; that although the directors may have been negligent in the discharge of their duties, whereby the cashier was enabled to misappropriate the funds of the bank and to conceal its true condition, by false reports to the comptroller of the currency and by false entries, yet inasmuch as the sureties had covenanted that the principal should "well and properly perform" his duties, and should "well and truly account for all moneys," etc., that should pass through his hands, their covenant was "unconditional, and no failure on the part of directors of the association short of actual fraud or bad faith can be deemed sufficient to exonerate them from its performance." The decision, however, as above noted, rested upon the particular facts of the case, and did not controvert this doctrine so stated by the court.[186] As to additional employment, sureties for the faithful performance of

[186] Graves v. Lebanon Nat. Bank, 10 Bush. (Ky.) 23, per Lindsley, J.; Thompson's Bank Cases, 492, n. 614. See further Tapley v. Martin, 116 Mass. 275, per Morton, J.; Thompson's Bank Cases, 611, n. 614-18. The court in this case cites Minor v. Mechanics' Bank of Alexandria,

the duties of the book-keeper of a bank are liable for his errors in that capacity, although he also performs the duties of teller, unless the errors were connected with or induced by the latter employment.[187] Gross negligence or want of such reasonable diligence and skill as the duties of the office necessitate, or dishonesty in the exercise of the office, render the sureties liable as a rule, although honest mistakes of judgment do not.[188] There is no doubt, however, that in insurances of an employee's fidelity the parties may make such terms and conditions as are valid under the law and which they may agree upon, and the terms of the contract must govern in all cases.[189] If a guarantee requires notice to the guarantor immediately of any criminal offense of the employee whose fidelity is insured, and for which insured may make claim, a failure to give the required notice avoids the policy.[190]

1 Pet. (U. S.) 46; United States v. Kirkpatrick, 9 Wheat. (U. S.) 720; Franklin Bank v. Stevens, 39 Me. 532; Farmington v. Stanley, 60 Me. 472. See Board of Supervisors v. Otis, 62 N. Y. 88.

[187] Home Sav. Bank v. Traube, 75 Mo. 199; 42 Am. Rep. 402.

[188] Melville v. Dodge, 6 Com. B. 450; Common Council of Alexandria v. Case, 2 Cranch (C. C.), 363; Union Bank v. Forest, 3 Cranch (U. S.), 218; Minor v. Bank of Alexandria, 1 Pet. (U. S.) 64; Commercial Bank v. Ten Eyck, 48 N. Y. 305; Bank of Washington v. Barrington, 2 Pa. 27; Bank of St. Mary v. Calder, 3 Strob. (S. C.) 403.

[189] As to when official bonds are valid and void, see note 82 Am. Dec. 760-64.

[190] Molson's Bank v. Guarantee Co. of North America, Montr. L. R., 4 Sup. Ct. Rep. 376. Where the policy stipulates that the books are kept in a certain manner and will be so kept, and that immediate notice be given the insurer, upon the employer's ascertaining the fact, of any criminal offense entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy, and the evidence showed no proper supervision of the books and that the guarantors were not notified until a week after the employé's defalcation and after he had left the country, a recovery was refused: Harbor Commrs. v. Guarantee Co. of North America, 22 S. C. R. (Can.) 542; 30 Can. L. J., N. S., 215. If an employer is insured against pecuniary loss sustained by him by reason of the dishonesty of employés "committed and discovered during the continuance of this agreement, and within three months from the death, dismissal, or retirement of the employé," and it is also stipulated that immediate notice be given to the company on the discovery of the employé's fraud or dishonesty, and the defalcation was not discovered

§ 2767. Expenditures Necessitated by the Loss—Marine Risk.—There are certain expenditures which, although not expressly provided for under the policy, are nevertheless recoverable because necessitated as a consequence of a peril covered by the insurance, and incurred for the benefit of the ship or the cargo; as expenses for repairs not consequent upon wear and tear, but by a peril insured against, necessitated in a port of distress, or in certain cases the wages or provisions for the crew or salvage, etc. This subject will, however, be more fully considered elsewhere. Charges and expenses incurred in handling and disposing of goods in case of a partial loss must be reasonable and proper, and for the purpose only of ascertaining the amount of loss in order to be estimated as a part of the loss. Charges for storage are not included, nor expenses for insurance paid by the consignee while in store at the place of delivery, although expenses for surveys, inspection, and sale at auction are properly a charge.[191]

§ 2768. Explosion Defined.—It is said in a leading case that "the word 'explosion' is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name are not susceptible of such statement as will always distinguish the occurrences. It must be conceded that every combustion of an explosive substance whereby other property is ignited and consumed would not be an explosion within the ordinary meaning of the term. It is not used as the synonym of combustion, and explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the re-

until after the policy had lapsed, and the company was not notified thereof until eleven days after the discovery, when the employé had had left the country, recovery was denied: Commercial Mut. B. Soc. v. London G. & A. Co., Montr. L. Rep., 7 Q. B. 307.

[191] Lamar Ins. Co. v. McGlasker, 54 Ill. 513. See sec. 2717, herein.

port vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word in each particular case must be settled not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort," and it should be of sufficient force to result in damage to the insured property.[192] In this case certain inflammable vapors evolved in the process of rectifying came in contact with flame, and "a sudden and violent combustion of the vapor accompanied by a noise, described by one witness as being like the crack of a gun, by another as if a bundle of iron had been thrown on the pavement, by another as a crash," was found to be an explosion.[193] In a policy before the court in a federal case, being an insurance covering steam boilers, "explosion" was thus defined: "By the term 'explosion' as used in this policy is to be understood a sudden and substantial rupture of the

[192] United Life F. & M. Ins. Co. v. Footh, 22 Ohio St. 340, per McIlvaine, J.

[193] See, also, Briggs v. North America etc. Ins. Co., 53 N. Y. 446; Boatman's Ins. Co. v. Parker, 23 Ohio St. 85; Everett v. London Assur. Co., 19 Com. B. N. S., 126; 34 L. J. Com. P. 299. Webster defines explosion as: "1. The act of exploding; bursting with a loud noise or detonation; a sudden inflaming with force and a loud report, as the explosion of gunpowder; 2. Steam engine: the shattering of a boiler by a sudden and immense pressure in distinction from rupture." "1. The act of exploding; a sudden expansion of a substance of gunpowder or an elastic fluid with force and usually a loud report; a sudden and loud discharge, as the explosion of powder; an explosion of firedamp. 'Explosive mixtures of coal gas and air may be inflamed by sparks struck from metal or stone': . . . . Frankland's Experiments in Chemistry, p. 541; 2. A sudden bursting or breaking up or in pieces from an internal or other force; a blowing up or tearing apart, as the explosion of a steam boiler": Century Dictionary, tit. "Explosion." "As the term is often rather loosely employed, 'explosion' may, for our purpose, be defined as the sudden or extremely rapid conversion of a solid or liquid body of small bulk into gas or vapor occupying very many times the volume of the original substance, and in addition highly expanded by the heat generated during the transformation. This sudden or very rapid expansion of volume is attended by an exhibition of force more or less violent, according to the construc- of the original substance and the circumstances of explosion. Any substance capable of undergoing such a change upon the application of heat or other disturbing cause is called 'explosion' ": 8 Encyclopedia Britannica, 9th ed., 807, tit. "Explosives."

shell or flues of the boiler or boilers caused by the action of steam." [194]

§ 2769. Explosion under Fire Risks—Steam Boiler. We have considered elsewhere the question of loss by explosion, as connected with excepted risks. But we believe that it may be stated here generally that under a fire risk the insurer is not liable for a loss by explosion where it has not assumed such risk, unless fire is the proximate cause thereof. The contract under a fire risk is to indemnify for loss by fire; it is not sufficient that the explosion which produced the loss was capable of causing or might have caused a fire. Fire is the effect of combustion, and is equivalent to ignition or burning; this does not necessitate that the property insured should itself be consumed or the identical property be even ignited, but there must be an actual ignition, and the loss must be the effect of ignition. In other words, the fire must be the proximate cause of the loss, whether the identical property itself be ignited or consumed, or other material or property near by be burned or ignited, in consequence of which a loss to the insured property follows from fire as the proximate cause. If, however, explosion be insured against, and it is the proximate cause of the loss, a recovery may be had.[195] The policy may,

[194] American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co., 57 Fed. Rep. 294; 48 Fed. Rep. 198.

[195] In such of the cases cited below as are not directly in point, the opinions of the court will be found to support the rule in the text: Taunton v. Royal Ins. Co., 2 Hen. & M. 233; Commercial Ins. Co. v. Robinson, 64 Ill. 265; Babcock v. Montgomery Ins. Co., 6 Barb. (N. Y.) 637, per Pratt, J.; Scripture v. Lowell etc. Ins. Co., 10 Cush. (Mass.) 356, per Cushing, J.; Gordon v. Remington, 1 Camp. 123, per Lord Ellenborough; Tanneret v. Merchants' Mut. Ins. Co., 34 La. Ann. 249; Dows v. Faneuil Hall Ins. Co., 127 Mass. 346; Boatman's F. & M. Ins. Co. v. Parker, 23 Ohio St. 85; Chicago Sugar Refining Co. v. American Steam Boiler Co., 48 Fed. Rep. 198; 21 Ins. L. J. 59; reversed 57 Fed. Rep. 294; 21 L. R. Annot. 572; McAllister v. Tennessee Ins. Co., 17 Mo. 306; Austin v. Drew, 6 Taunt. 436; 4 Camp. 360, per Gibbs, C. J.; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; Montgomery v. Fireman's Ins. Co., 16 B. Mon. (Ky.) 427; Insurance Co. v. Tweed, 7 Wall. (U. S.) 44; Stanley v. Western Ins. Co., 3 L. R. Ex. 71; 37 L. J. Ex. 73; Millaudon v. New Orleans Ins. Co., 4 La. Ann. 15; Briggs v. North American Ins. Co., 53 N. Y. 447; Everett v. London

however, be so worded as to cover a loss by explosion. Thus, a loss by explosion may come within the clause "all other perils," etc.,[196] and the words "fire originating from any cause" will cover loss arising from explosion.[197] The rule above stated is further subject to such qualifications and exceptions as are noted in the sections next following.

§ 2770. **Same Subject—Spontaneous Combustion.**—The above rule does not prevent recovery for spontaneous combustion causing fire, but includes such a loss.[198] In an ordinary marine policy the insurance against fire does not cover the case of spontaneous combustion caused by the inherent infirmity of the goods insured.[199]

§ 2771. **Same Subject—Where Combustion and Explosion Inseparably Connected.**—If the combustion and explosion are inseparably connected, if a combustible substance in the process of combustion produces explosion also and fire is the agent throughout, and there is a loss by both fire and explosion, it is held that the whole damage is covered by a policy insured against loss by fire.[200]

Assur. Co., 19 Com. B., N. S., 126; 34 L. J. Com. P. 299; Perrin v. Protection Ins. Co., 11 Ohio, 147; 38 Am. Dec. 728; Waters v. Merchants' Louisville Ins. Co. 11 Pet. (U. S.) 213; 1 McLean (U. S.), 275; Kennisston v. Merrmack Ins. Co., 14 N. H. 341; Hobbs v. Northern Assur. Co., 8 Ont. 343 (one judge dissenting); reversed, 12 Can. Supr. Ct. 631; St. John v. American Mut. F. & M. Ins. Co., 11 N. Y. 516; 1 Duer (N. Y.), 371; United L. F. & M. Ins. Co. v. Foot, 22 Ohio St. 340; 10 Am. Rep. 735; Evans v. Columbian Ins. Co., 44 N. Y. 146. But see dissenting opinion of Hunt, J. See note as to loss caused by explosion, 34 Am. Rep. 387-89.

[196] Citizens' Ins. Co. v. Glasgow, 9 Mo. 406; British American Ins. Co. v. Joseph, 9 L. C. 448; Perrin v. Protection Ins. Co., 11 Ohio, 147.

[197] Renshaw v. Fireman's Ins. Co., 33 Mo. App. 394.

[198] See British American Ins. Co. v. Joseph, 9 L. C. Q. B. 448, and cases and opinions in note under last section.

[199] Providence-Washington Ins. Co. v. Adler, 65 Md. 162; 57 Am. Rep. 314. See, also, Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 17, pp. 349, 350.

[200] Scripture v. Lowell F. M. Ins. Co., 10 Cush. (Mass.) 356; Dow v. Faneuil Hall Ins. Co., 127 Mass. 346, per Gray, C. J. See Hobbs v. Guardian F. Ins. Co., 12 Can. Supr. Ct. 631; reversing 8 Ont. 343 (one judge dissented in court below). But see United Life F. Ins. Co. v.

§ 2772. Same Subject—Where Fire Precedes or Causes the Explosion.—If a fire precedes and causes the explosion, so that the fire becomes the proximate cause of the loss, this is covered by a policy against loss or damage by fire. The principal discussions, however, in cases of this character have been upon the point of proximate cause of loss; as in cases where the explosion is not followed by fire, or where the explosion is on other premises but is caused by fire, and the injury to the insured property is only from concussion, or where fire causes an explosion which in turn causes fire, and this is carried a long distance and is communicated to the insured property. The general principle, however, that the proximate cause of the loss must be reducible to a peril covered by the policy, and the loss must be not too remote a consequence of such peril, but a direct consequence thereof,[201] applies here, although it is also true that the rule is subject to modification.[202] It is difficult, nevertheless, to separate the different factors which necessarily enter into a discussion of this kind, as is illustrated by the case of an accidental communication of fire to gunpowder, or the ignition of some other substance which consumes with less rapidity; or in case where certain vapors evolved by certain processes in the business carried on upon the insured premises come in contact with fire, causing an explosion; or in case of explosion resulting from fire, owing to the peculiar character of the substance, such as flour-dust or starch-dust in manufactories. What constitutes a "fire," as that word is used in the policy, has also been discussed, and in this connection a burning lamp, a lighted candle, or gas jet, or other flame, have been considered. In these and other cases the courts have exhaustively discussed the question of liability of insurers and of proximate and remote

Foote, 22 Ohio St. 340, per McIlvaine, J. And see chapters on excepted risks and losses, fire and accident, and cases noted in next section.

[201] Taylor v. Dunbar, L. R. 4 Com. P. 206; Smith v. Universal Ins. Co., 6 Wheat. (U. S.) 185, per Story, J.; Babcock v. Montgomery etc. Ins. Co., 4 Comst. (N. Y.) 326; 6 Barb. (N. Y.) 637.

[202] Peters v. Warren Ins. Co., 14 Pet. (U. S.) 110; Waters v. Louisville Ins. Co., 11 Pet. (U. S.) 220, per Story, J.

cause, as applied to the facts in each case, and it is difficult to formulate any rule other than the general one first stated under this section, which assumes as the basis that fire is the agent and proximate cause of the loss. If the facts give room for a discussion whether there is succession of causes, or whether fire is the proximate cause of loss, and the policy is against loss by fire, the question must first be determined whether the fire is the proximate cause of the loss, and be so found before the insurer can be held liable. And although it has been broadly stated that if the explosion is caused by fire the latter is the proximate cause of the loss,[203] yet this statement could never have been intended to be taken broadly, but only in connection with the facts of each particular case before the court, for if the fire is only one of a series of causes, a remote cause and not the proximate cause of the loss, there can be no recovery, even though it precedes and causes the explosion. Thus, where a gunpowder magazine, about a mile distant, exploded from some unknown cause, and the injury sustained by the insured property was only from concussion without fire, it was held that this was not a loss or damage by fire, even upon the assumption that it was occasioned by a concussion caused by fire, it being said that this necessitated a seeking the cause of causes to arrive at the origin of the loss.[204] To further illustrate: In a comparatively recent case where a

[203] Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213, per Story, J.

[204] Everett v. London Assur. Co., 19 Com. B., N. S., 126; 34 L. J. Com. P. 299; Caballero v. Home etc. Ins. Co., 15 La. Ann. 217. See Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, per Cushing, J. In cases of the character under consideration, the words of Erle, C. J., are important. "The relation of cause and effect is matter which cannot always be actually ascertained, but if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of one to the other may be considered as established," but events may be too distinctly connected with each other to stand in relation with cause and effect: Ionides v. Universal M. Ins. Co., 14 Com. B., N. S., 259, per Erle, C. J. See Marsden v. City & County Assur. Co., L. R. 1 Com. P. 240, per Willes, J.; Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213, per Story, J.; Bacon's Maxims, reg. 1; Insurance Co. v. Boone, 95 U. S. 117.

blaze originated in a starch kiln, and in attempting to extinguish it a cloud of starch-dust was stirred up which came in contact with the flame and exploded, this was held an "accident" under an insurance covering "explosion and accident," and a recovery was permitted for loss directly caused by explosion and a resulting fire. This decision was, however subsequently reversed, on the ground that the explosion was merely an incident of the fire, and upon the further ground that the company had no power to insure against fire, and also because the policy expressly excepted loss or damage by fire resulting from any cause whatever.[205] Where the explosion was caused by fire, gunpowder being ignited, the fire was held the proximate cause of the loss.[206] It will be observed that in this case there was an explosion of gunpowder. In case of the explosion of a steam boiler, it is true that in one sense the explosion is the consequence of fire used to generate steam.[207] Again, we have noted in a preceding section one case where combustion and explosion were held inseparably connected,

[205] Chicago Sugar Refining Co. v. American Steam Boiler Co., 48 Fed. Rep. 198; 21 Ins. L. J. 59; reversed, 57 Fed. Rep. 294; 21 L. R. Annot. 572; Washburn v. Miami Valley Ins. Co., 2 Flip. (C. C.) 664; 2 Fed. Rep. 633; 9 Ins. L. J. 761 (similar case of flour-dust and explosion).

[206] Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213; 1 McLean (C. C.), 275.

[207] See sec. 2796. See St. John v. American Mut. F. & M. Ins. Co., 11 N. Y. 516, per Denio. J.; Thames & Mersey M. Ins. Co. v. Hamilton, L. R. 12 App. C. 484, per Lord Halsbury, L. C. "Our opinion excludes, of course, all damage by mere explosion not involving ignition and combustion of the agent of explosion, such as the case of steam or any other substance acting by expansion without combustion. . . . . Cases are conceivable, other than by the use of gunpowder, of explosion without any combustion, which nevertheless being the result of the action of fire are still, it would seem, within the range of the general principle. Various mineral substances exist of value in commerce and the trade which explode by the action of fire without either ignition or combustion. In general, any close vessel, of whatever material composed, when filled with an expansive fluid is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens under certain conditions to some forms of wood, which, although combustible, may by the action of fire explode without igni-

gunpowder being accidentally exploded with contact with fire.[208] And where the loss is increased by explosion incident to the fire, and the fire is the proximate cause of the loss, the insured, it is held, may recover the entire loss.[209] But it is held in an English case where an inflammable and explosive vapor emitted or evolved in the process of extracting oil from shoddy ignited, set fire to the premises, then exploded, and was followed by a further fire, that the insurers were liable for all damages caused by fire not the result of the explosion, but not for loss by the explosion, or for any of the consequences thereof. So far, however, as the loss by explosion was concerned, liability therefor was excepted by the terms of the policy. It was also declared in this case that insurers were liable for all damages occasioned by the use of water to extinguish the fire.[210] So where a fire is the moving cause of the explosion, as where a building is blown up to stay the progress of a conflagration in progress, here fire is the cause of the loss, even though the original fire was produced by explosion, and insurers are liable.[211] If a loss or any other combustion results from an explosion, where the explosion is caused by a destructive fire already in progress, it comes within the general risk of a policy against fire only, and is a doctrine based on reason and justice and sustained by author-

tion, or which, as in the present case of a house, by having compressed within it some burning substance which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part or of part explosion": Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. (Mass.) 356, per Cushing, J.

[208] But see Everett v. London Assur. Co., 19 Com. B., N. S., 126; Cabalero v. Home Ins. Co., 15 La. Ann. 217; Scripture v. Lowell M. F. Ins. Co., 10 Cush. (Mass.) 356, per Cushing, J.; Taunton v. Royal etc. Ins. Co., 2 H. & M. 235.

[209] Transatlantic Ins. Co. v. Dorsey, 56 Md. 70.

[210] Stanley v. Western Ins. Co., 37 L. J. Ex. 73; 3 L. R. Ex. 71. See United Life F. & M. Ins. Co. v. Foote, 22 Ohio St. 340; Briggs v. North American Ins. Co., 53 N. Y. 446; 66 Barb. (N. Y.) 325, 330 (in this case it was declared that a burning lamp is not a fire within the policy); Boatman's F. & M. Ins. Co. v. Parker, 23 Ohio St. 85.

[211] Stanley v. Western Ins. Co., 37 L. J. Ex. 73; 3 L. R. Ex. 71; Greenwald v. Insurance Co., 3 Phila. (Pa.) 323; City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367. See Insurance Co. v. Tweed, 7 Wall. (U. S.) 44, chapter "Excepted Risks and Losses—Fire."

ity.[212] And where a fire occurs upon the premises insured by which an explosion of gunpowder takes place, the insurer is responsible for the loss which is the direct consequence of the combustion.[213] But where the building was blown down by a storm, and the storm blew fire in contact with escaping gases and air and created an explosion, this was held not a loss by fire.[214] It will be seen from an examination of the decisions cited under this and the three preceding sections that the cases are not in harmony upon the point as to when fire and when explosion, is the proximate cause of the loss. Necessarily, as already stated, each case must rest largely upon the particular facts before the court, as well as upon the terms of the policy in that case. We believe, however, that in so far as we have attempted to formulate any rules under these sections relating to explosion, they accord with the weight of authority and opinion

§ 2773. **Fallen Building—What Constitutes.**—A fallen building, within the meaning of a fire policy, is, as a general rule, one which has lost its distinctive character as the building insured before it is subjected to the operation of a peril within the policy.[215] If the building is standing complete or intact, the fact that its supports are weakened, that it is out of plumb, that it is greatly dilapidated, and not safely habitable, does not make it a fallen building.[216] In determining what constitutes a fallen building within a fire risk the character, construction, and relative situation to adjoining

[212] United L. F. & M. Ins. Co. v. Foote, 22 Ohio St. St. 340, per McIlvaine, J., citing Waters v. La Mar Ins. Co., 11 Pet. (U. S.) 213: Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 35; Millaudon v. New Orleans Ins. Co., 4 La. Ann. 15.

[213] Caballero v. Home Mut. Ins. Co., 15 La. Ann. 217.

[214] Transatlantic Ins. Co. v. Dorsey, 56 Md. 70; 40 Am. Rep. 403.

[215] Nave v. Home Mut. Ins. Co., 90 Am. Dec. 394; 37 Mo. 429; Brennan v. Liverpool etc. Ins. Co., 51 Cal. 101; Fireman's F. Ins. Co. v. Congregation Rodolph Sholen, 80 Ill. 558; Dows v. Insurance Co., 127 Mass. 346; Lewis v. Springfield F. & M. Ins. Co., 10 Gray (Mass.), 159; Liverpool etc. Ins. Co. v. Ende, 65 Tex. 118; Huck v. Globe Ins. Co., 127 Mass. 306; 34 Am. Rep. 273.

[216] Fireman's Ins. Co. v. Congregation Rodolph Sholen, 80 Ill. 558; 8 Chic. Leg. News, 178.

buildings are important.[217] If the building is so far demolished by a peril not within the policy as to become a mere mass or congeries of materials, it has undoubtedly lost its distinctive character as the building insured.[218]

§ 2774. **Falling Walls, Buildings, and Structures.**—We have given consideration to this subject elsewhere in connection with excepted risks and losses under fire policies, but it may be stated here that in determining whether there has been a loss by fire, the walls of a building or structure having fallen, the court will consider whether the fire operated as a proximate cause of the loss upon the subject insured. That it could not so operate is clear if the building or structure insured has before the fire occurred ceased to exist as such, and has become a mere mass or congeries of materials, and has, although not entirely fallen, become so far demolished as to have lost its distinctive character as the particular building insured, owing to a cause not a peril insured against, such as inherent defects or weakness in the building itself, high winds, tornadoes, earthquakes, withdrawal of necessary supports, by digging away the underlying or adjacent soil, or some other cause not a peril within the policy.[219]

[217] If a building consists of two parts or halves separated from each other by partition walls of brick, each of the two parts capable of standing or falling by itself, they are so far separate and distinctive buildings, even though there be connecting doors, that one part may be and the other part not be a fallen building. Thus, if substantially all the floors and roof of one part falls by a peril other than one insured against, leaving nothing standing but the outer walls, with the exception, perhaps, of a staircase or elevator, this part is a fallen building, but if the other half is not affected by such falling, but remains undisturbed, complete, and uninjured as to all its parts, it is not a fallen building: Walker v. Queen Ins. Co., Stowe v. Girard Ins. Co., Huck v. Globe Ins. Co., 127 Mass. 306; 34 Am. Rep. 373. See Lewis v. Springfield F. & M. Ins. Co., 10 Gray (Mass.), 159.

[218] Nave v. Home Mut. Ins. Co., 37 Mo. 430.

[219] Dow v. Faneuil Hall Ins. Co., 127 Mass. 346, per Gray, C. J.; Nave v. Home Mut. Ins. Co., 37 Mo. 430; Huck v. Globe Ins. Co., 127 Mass. 306; 34 Am. Rep. 273. See Pelican Ins. Co. v. Troy Co-operative Ins. Co., 77 Tex. 225; 13 S. W. Rep. 980. But examine Lewis v. Springfield F. & M. Ins. Co., 10 Gray (Mass.), 159.

§ **2775. Fallen Building, etc.—Wall Weakened by Previous Fire.**—If an edifice, building, or structure insured against loss by fire is partially consumed, and the walls so weakened thereby that they fall during the progress of the fire, or so shortly thereafter that it may reasonably be held that fire is the efficient proximate cause of the loss, this is covered by a fire policy, and the same would be true where the walls of such partly consumed building fall upon and crush another structure. But the question may rest upon the factor of reasonable time, for the mere fact of the weakening of the walls by fire will not aid the assured where the weakened walls do not fall until some time thereafter, and then by some other cause, as by high wind, after several days.[220]

§ **2776. Fear of Danger—Blockade—Apprehension of Embargo, etc.—Marine Risk.**—Whether the breaking up of a voyage from fear of capture, as where the port of destination is shut, is justified is an unsettled question in this country. In England it seems well established that a mere denial of entry or interdiction of commerce at the port of destination, whether said port be in hostile occupation or there be a blockade or embargo whereby a loss is sustained, is not a peril embraced by the terms of the policy.[221]

§ **2777. Same Subject—Cases.**—It is held in Louisiana that a restraint exists, even though there be no seizure, if the power of the blockading squadron is applied so effectually and directly as to break up the voyage, and if a vessel is pre-

[220] Gaskarth v. Law Union Ins. Co. (Eng. Manchester Civ. Ct.), 6 Ins. L. J. 159; Johnston v. West of Scotland Ins. Co., 7 Ct. Sess. Cas. (Scot.) 52.

[221] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *788; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, citing Parkin v. Tunno, 11 East, 22; Hadkinson v. Robinson, 3 Bos. & P. 388; Foster v. Christie, 11 East, 205, and other cases. See, also, Rodocanachi v. Elliott, 28 L. T., N. S., 845. See, also, 2 Duer on Marine Insurance, ed. 1846, 628, who states the rule, but says: "Yet the language of the judges leaves us in doubt whether, if the ship enters the foreign port and the property is then seized and confiscated, the loss ought not to be attributed to a peril covered by the policy if when it was effected the existence of the risk was unknown to the assured."

vented by a blockading squadron from entering her port of destination, and she is required to return to her port of departure, this entitles her owners to recover on a policy by which she is insured on a recovery against the "arrests, restraints, and detainments of kings, princes, people," etc.[222] In a Pennsylvania case the policy was on goods against unlawful restraints, etc., and a blockading squadron drove the vessel away from an intermediate port, and, the blockade being lawful, it was held not a loss covered by the policy.[223] In another case in the same state the warning not to proceed was indorsed on the register, and a distinction was made between the hailing and warning a vessel at sea and entering on board and indorsing the papers; that the writing on a sea letter and register carries with it its own evidence, to be seen by those who visit the ship thereafter, and that if she then attempts to proceed or return she is liable to be and uniformly is taken.[224] In a New York decision it is declared that the fear of danger or misfortune is not the misfortune itself.[225] In another case in the same state, where notice of the fact of a blockade was given, the consignees received the goods at the nearest neutral port into which the vessel proceeded, and the claim of a total loss was sustained.[226] But it is also there held that assurers are not liable for a loss consequent upon proceeding upon the voyage in total disregard of a notice received and of the danger.[227] But the master is not bound to regard an un-

[222] Vigers v. Ocean Ins. Co., 12 La. Ann. 363; 32 Am. Dec. 118; citing Olivera v. Union Ins. Co., 3 Wheat. (U. S.) 183.

[223] Thompson v. Read, 12 Serg. & R. (Pa.) 440.

[224] Savage v. Pleasants, 5 Binn. (Pa.) 403. See argument of Brakenridge, J. See as to warning indorsed on papers, King v. Delaware Ins. Co., 6 Cranch (U. S.), 71; 2 Wash. (C. C.) 300, noted below; Ferguson v. Phœnix Ins. Co., 5 Binn. (Pa.) 544.

[225] In this case it was provided in the policy that if turned away the vessel might proceed to a port not blockaded, and, being warned not to proceed to certain ports, she proceeded to Gibraltar for advice, where she remained several days, and having received permission to proceed to Barcelona, she broke up her voyage on intelligence received, as she was getting under weigh, of the French and Spanish decrees: Craig v. United Ins. Co., 6 Johns. (N. Y.) 226.

[226] Schmidt v. United Ins. Co., 1 Johns. (N. Y.) 249.

[227] Schmidt v. United Ins. Co., 1 Johns. (N. Y.) 263.

authorized threat of seizure by an individual claiming to exercise an authority not warranted.[228] Again, it is held in the same state that if there is no evidence that the port of destination is blockaded or trade interdicted, the mere apprehension of seizure or confiscation does not create a loss of the voyage, for the fear of loss is not the loss itself.[229] In a federal case it is held no less within the policy where the vessel is abandoned by reason of false intelligence and the fear of danger occasioned thereby. In this case, however, the vessel was warned, as in the Pennsylvania case above noted, not to proceed by indorsement on her papers.[230] In Massachusetts the denial of entry or an interdiction of commerce is not a risk within the policy, nor the ground of a claim for total loss or abandonment, whether the vessel be prevented from entering or leaving port.[231] In a case in the United States supreme court the vessel was laden before the institution of the blockade, and, being ordered back by the blockading squadron, it was held an unlawful restraint, and the insurers liable.[232] Another decision of the federal courts holds that a temporary restraint and delay to avoid capture not being shown to have defeated the object of the voyage, and being removed before any loss took place, and the real cause of the breaking up of the voyage and loss being a fear of loss by seizure, it was not a restraint within the meaning of the policy.[233]

[228] Williams v. Suffolk Ins. Co., 13 Pet. (U. S.) 415; affirming 3 Sum. (C. C.) 270.

[229] Corp v. United Ins. Co., 8 Johns. (N. Y.) 278. See, also, Wilson v. United Ins. Co., 14 Johns. (N. Y.) 227. But see Saltus v. United Ins. Co., 15 Johns. (N. Y.) 523.

[230] King v. Delaware Ins. Co., 6 Cranch (U. S.), 71; 2 Wash. (C. C.) 300. See Savage v. Pleasants, 5 Binn. (Pa.) 403, above noted.

[231] Amory v. Jones, 6 Mass. 318; Brewer v. United F. & M. Ins. Co., 12 Mass. 288; Cook v. Essex F. & M. Ins. Co., 6 Mass. 122; Tucker v. United F. & M. Ins. Co., 12 Mass. 288; Richardson v. Maine F. & M. Ins. Co., 6 Mass. 102; Lee v. Gray, 7 Mass. 349.

[232] Oliveria v. Union Ins. Co., 3 Wheat. (U. S.) 183.

[233] Smith v. Universal Ins. Co., 6 Wheat. (U. S.) 176, citing Lubbock v. Rowcroft, 5 Esp. 50; Hadkinson v. Robinson, 3 Bos. & P. 388. Examine Symonds v. Union Ins. Co., 4 Dall. (U. S.) 417; 1 Wash. (C. C.) 382. See Andrews v. Essex F. & M. Ins. Co., 3 Mason (C. C.), 21, per Story, J. *Opinions of Courts on the Above.*—"The loss must be occasioned by some peril actually insured against; the peril must act

§ **2778. Same Subject—Conclusion.**—It is no doubt true that a mere fear of danger or a peril insured against is too remote to be considered a peril operating to effect a loss or to justify an abandonment; nor is a mere apprehension of loss which is not justified by the facts a sufficient ground for re-

directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it, and it is not sufficient that the voyage be abandoned for fear of the operation of the peril": Smith v. Universal Ins. Co., 6 Wheat. (U. S.) 176, per Story, J. "Where underwriters have assured against capture and restraint of princes, and the captain, learning that if he enters the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating the total destruction of the thing insured. The doctrine (that assured might abandon in respect to a loss of the voyage) is only applicable to cases in which the loss is occasioned by a peril insured against, which, as it appears to me, must be a peril acting upon the subject insured immediately and not circuitously, as in the present case": Hadkinson v. Robinson, 3 Bos. & P. 388, per Lord Alvanley, quoted in 2 Arnould on Marine Insurance, Perkins' ed. 1850, 786; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 740. The assured "should proceed upon his voyage until the danger of an actual loss is made manifest": King v. Delaware Ins. Co., 2 Wash. (C. C.) 300, per Washington, J. *Opinions of Text-writers on the Above.*—So far as Mr. Parsons expresses any opinion, he states in the text that the doctrine is unsettled, and in the note that the principle is generally correct that the fear of a peril insured against is not a good reason for an abandonment, but that the only question is, When is the principle to be applied? 1 Parsons on Marine Insurance, ed. 1868, 585, et seq. In the third edition of Mr. Phillips' work he says: "In case of the master justifiably turning off to another port of discharge or to his port of departure merely to avoid certain capture at that of the original destination, the risk continues on the ship, cargo, or freight until arrival"; and again: "Where after the risk has begun the voyage is inevitably defeated by blockade or interdiction at the port of departure or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely certain that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended, and also that an assured on the cargo has a right to abandon": 2 Phillips on Insurance, 3d ed., 647, 655, 657, sec. 1115. See, also, Id., p. 666, sec. 1127. Mr. Arnould's opinion is in accord with that expressed as the English rule in the beginning of this subject. "Although," he says, "whether if the question were res integra this decision could be upheld as a sound application of the principles of law is another question." Mr. Maclachlan, re-

linquishing the voyage. The restraint must be something more than a merely expected or contingent one, but if we pass beyond the point of fear, mere expectation, or unjustified apprehension to that where the danger becomes so imminent that it is almost a certainty that the vessel will if she proceeds sustain an actual loss, the question is at once suggested whether the fear of the danger has not become merged to such an extent in the danger itself that there is an actual operative restraint; as where the vessel is turned away by a blockading squadron at the port of destination.[234]

§ 2779. **Fire.**—The questions as to what is a loss by fire and what is fire have given rise in numerous cases to exhaustive discussions, especially in those decisions which relate to explosion, lightning, falling walls, etc., and necessitates the inquiry whether "fire," as that word is used in policies covering that risk, is the proximate cause of loss under the circumstances of each particular case. What is "fire" is a question not clearly settled so as to be applicable to all cases. Reference must, however, be had to the meaning of that term as used in the contract, and should not be confined to any technical and restricted meaning dependent upon a scientific analysis of its nature and properties, and while it should be construed in its ordinary signification, still it should not receive that general and extended meaning which is sometimes applied to the term. It should be given that construction which conforms to the popular ordinary sense in which it is used. It is

ferring to these doubts, says, however, "that the portion so established is in accordance with the principles of marine insurance law, as applied under other circumstances; also besides those that are here specially discussed": 2 Arnould on Marine Insurance, Perkins' ed. 1850, 788; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 741.

[234] "A just fear of one of the perils insured against," says Chancellor Kent, "has been deemed equivalent to vis major when that has been applied directly and effectually; as in the case of a blockading squadron so as to break up the voyage. The danger was imminent, and might be present and palpable, as well as apparently remediless and morally certain. If, therefore, the danger be so great as to amount to almost a certainty of capture, it becomes a restraint in contemplation of the policy, and this is the doctrine best supported by authority": 3 Kent's Commentaries, 5th ed., 293, 294.

rather an effect, than an elementary principle; it is the effect of combustion, and is equivalent to ignition or burning; yet heat is not "fire." Timber may be contracted from the heat of the sun, and a loss be thereby sustained, yet it is not a loss by "fire," although there may be a loss from heat, and "fire," nevertheless, be the proximate cause of such loss.[235] So a burning lamp is not itself a "fire,"[236] nor is a burning gas jet itself a "fire" or a destructive force, against the immediate effects of which a policy is intended as a protection, even though a possible means of putting a destructive force in motion.[237] These statements as to the lamp and gas jet should not be confused with the ignition or combustion which ensues by reason of the accidental contact with some part of the building of a gas jet or by the overturning of a lamp. Lightning per se is not "fire."[238] Fire, as noted elsewhere, when used for certain manufacturing and other special purposes, and while confined within the limits where it is usually kept for such purposes, is not "fire" within the terms of the policy.[239] And whether explosion of certain substances is a loss by "fire" has also been noted elsewhere.[240] Fire covers a loss by the breaking of machinery where the same is caused by the direct operation of fire upon electrical machinery.[241] Whatever may be held to be the meaning of the word "fire" in any particular case before the court, losses by fire will cover every loss, damage, or injury to the insured property of which "fire" is the proximate cause. It includes every loss necessarily following from the occurrence of a fire, if it arises directly and

[235] Babcock v. Montgomery Ins. Co., 6 Barb. (N. Y.) 637, per Pratt, J.; Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, per Cushing, J.

[236] Briggs v. North America etc. Ins. Co., 53 N. Y. 447, per Peckham, J.

[237] United States L. F. & M. Ins. Co. v. Foote, 22 Ohio St. 340, per McIlvaine, J. But see Boatman's Ins. Co. v. Parker, 23 Ohio St. 85.

[238] Babcock v. Montgomery Ins. Co., 6 Barb. (N. Y.) 637; Kenniston v. Merrimack Ins. Co., 14 N. H. 341. See sec. 2790, herein.

[239] Austin v. Drew, 4 Camp. 360; Millaudon v. New Orleans Ins. Co., 4 La. Ann. 15 See Jameson v. Royal Ins. Co., 7 Ir. R. L. 126. See secs. 2768-72, 2796, herein.

[240] See secs. 2768-72, herein.

[241] See sec. 2761, herein, "Electrical Machinery and Fixtures," etc.

immediately from the peril or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided. It is not necessary that the identical property, or even any part of it, be consumed or burned or even ignited. If the loss be the direct effect of ignition or burning, or be the result of bona fide efforts justified by the circumstances to save property, as in the case of removal of goods, the destruction of buildings to prevent the spread of a conflagration, the use of water to extinguish the fire, it is a loss by fire. The fire may not extend to the particular articles insured; they may be shriveled, cracked, or discolored by intense heat, the effect of an actual fire, or damaged by smoke, or may be broken or stolen while being removed or while other efforts are made to save them from the impending peril. So a loss from falling cinders, falling walls weakened by fire, or the fall of burning buildings may be a loss by "fire." This rule is clearly deducible from and well settled by the cases, and the principles involved run through the opinions of the courts and a long line of decisions.[242] A policy against loss or damage by fire without qualification is broad enough to include all fires of whatever origin and all damages therefrom of whatever character.[243] So a risk covering all loss or damage by fire includes loss occasioned to goods in the building caused by the accidental ignition of soot in the chimney or the smoke

[242] Brady v. Northwestern Ins. Co., 11 Mich. 425; Norwich etc. Co. v. Western Ins. Co., 34 Conn. 561; Gersik v. Crescent Mut. Ins. Co., 19 La. Ann. 297; McCary v. New Orleans etc. Co., 10 Rob. (La.) 202; 43 Am. Dec. 180; Magoun v. New England M. Ins. Co., 1 Story (C. C.), 157; City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; Metallic Co. v. Fitchburg R. R. Co., 109 Mass. 277; Babcock v. Montgomery Ins. Co., 6 Barb. (N. Y.) 636; White v. Republic F. Ins. Co., 57 Me. 91; 2 Am. Rep. 22, per Dickenson, J.; New York etc. Desp. Ex. Co. v. Traders & Mechanics' Ins. Co., 132 Mass. 377; 42 Am. Rep. 440, per Endicott, J.; Austin v. Drew, Holt N. P. 127, per Gibbs, C. J.; Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, per Cushing, J.; Witherell v. Maine Ins. Co., 49 Me. 200; Balestracoi v. Fireman's Ins. Co., 34 La. Ann. 844; Lewis v. Springfield Ins. Co., 10 Gray (Mass.), 159; Patrick v. Commercial Ins. Co., 11 Johns. (N. Y.) 14, and cases throughout this chapter.

[243] Renshaw v. Missouri etc. Ins. Co., 103 Mo. 595; 23 Am. St. Rep. 904.

arising therefrom.[244] Where a lamp accidentally flames up and damage is sustained by reason of the smoke and soot therefrom, this is not a loss by fire.[245] Nor is damage occasioned by escaping steam from a steam heat-pipe, although the furniture and books of a library are charred and injured thereby, a loss by fire.[246]

§ **2780. Fire—Marine Risk.**—The common form of a marine policy covers the risk of fire at sea in a steamer.[247] But the fact that a memorandum of insurance against fire on an unfinished vessel lying at a wharf is entered in the marine docket of an insurance company does not determine the nature of the contract and make it one of marine insurance.[248] If the ship be justified in putting into dry dock for repairs, and is there burned, she is covered by a marine policy insuring against fire.[249] But under an open policy on provisions until landed the insurers are not liable for their destruction by fire after being landed.[250] In marine insurances, as stated elsewhere, the ordinary policy against fire does not cover spontaneous combustion caused by inherent infirmities of the insured cargo,[251] but it does cover damage by fire caused by lightning or by the fire of enemies,[252] and the destruction of a ship to prevent a capture.[253] Where a collision occurred

[244] Way v. Abington Mut. F. Ins. Co. (Mass. 1896), 43 N. E. Rep. 1032.

[245] Samuels v. Continental Ins. Co. (Pa. C. P.), 2 Pa. Dist. Rep. 397.

[246] Gibbons v. German Ins. etc. Inst., 30 Ill. App. 263.

[247] Pattison v. Mills, 1 Dow & C. 342; 2 Bligh. N. S., 319.

[248] Eureka Ins. Co. v. Robinson, 36 Pa. St. 256; 94 Am. Dec. 65.

[249] Ellery v. New England Ins. Co., 8 Pick. (Mass.) 20, per Putnam, J. See, also, Pelly v. Royal Exch. Assur. Co., 1 Burr. 341; Brough v. Whitmore, 4 Term Rep. 406. Examine Harrison v. Ellis, 7 El. & B. 465; Martin v. Salem Ins. Co., 2 Mass. 420.

[250] Mansur v. N. E. Mut. M. Ins. Co., 12 Gray (Mass.), 520. See Fire Ins. Co. v. Merchants' etc. Transp. Co., 66 Md. 339, and cases in last note.

[251] Providence-Washington Ins. Co. v. Adler, 65 Md. 162; 57 Am. Rep. 314. Examine Boyd v. Dubois, 3 Camp. 132; Taylor v. Dunbar, L. R. Com. P. 206; Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 17, pp. 349, 350. See c. xii, sec. 9, p. 311, et seq.

[252] See sec. 2790, herein, and notes.

[253] Gordon v. Rimmington, 1 Camp. 122. Same principle in Kohn v. New Orleans Ins. Co., 12 La. (O. S.) 348. And examine Ætna Ins.

by which a steamer, which was insured against fire only, was stove in and the fire in the furnaces was forced out from the boilers and set fire to the steamer, causing the vessel to sink, the jury found that the vessel would have floated had not the fire burned away the light upper woodwork of the steamer. It was held that the insurers were liable for the damages caused by the fire and sinking of the vessel, but not for damages caused by the collision.[254] And where the insurer of a vessel assumes by express covenant all risk of damages thereto by fires, with the one exception of those caused by explosion of boilers, a subsequent clause in the policy in which the assured warrants in general terms that the insurer shall be free from any claims for loss or damage occasioned inter alia "by the collapsing of flues" will not relieve the insurer from liability for loss by fire occasioned by the collapsing of a flue.[255] Again, the meaning of the general word "at" after the enumeration of specific perils may, it is held, be extended by the introduction of the word "fire" into a specification of perils.[256] If goods are shipped in a damaged condition and ignition or combustion ensues in consequence, the insurer is not liable, except as to such goods on board as in no way contributed thereto.[257]

Co. v. Boon, 95 U. S. 117; Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 17, pp. 350-52, who says: "But when it is impossible to resist the enemy and to avoid being taken, it is commendable in them to set fire to the vessel and take refuge on shore with the crew. The insurers are liable for the loss happening under such circumstances." In a note thereto by Meredith, at page 351, it is said: "Emerigon, Valin, and Pothier agree that the willful destruction of the ship under such circumstances is lawful, provided the crew make their escape. In England, the case of Gordon v. Rimmington, 1 Camp. 122, accords with the text, except that it affixes no such humane condition."

[254] Norwich etc. Co. v. Western Ins. Co., 34 Conn. 561.

[255] Louisville Underwriters v. Durland (Ind.), 7 L. R. Annot. 399.

[256] West India Tel. Co. v. Home etc. Ins. Co., 6 Q. B. D. 51. But see Thames & Mersey Ins. Co. v. Hamilton, L. R. 12 App. C. 484.

[257] Boyd v. Dubois, 3 Camp. 133. See Montoya v. London Assur. Co., 6 Exch. 451; Koebel v. Saunders, 33 L. J. Com. P. 310. Emerigon mentions a case where the ship was refused entry, and was set fire to from fear of the plague, and states that the insurers paid the loss without any difficulty. He also notes another instance where the au-

§ 2781. Freight.[258]—If by reason of the perils insured against the ship sustains such loss that she is prevented from transporting the goods, or if the goods are lost so that freight may not be earned, there is a loss of freight.[259] The contract contemplates that the goods shall arrive at the port of delivery notwithstanding the perils specified.[260] The owner of a cargo who has paid freight in advance to the owners cannot recover under a policy insuring prepaid freight, the money being advanced for freight of a cargo owned by assured, and not an absolute payment of freight, and the assured not having any interest in the earnings of the vessel either by way of pledge or lien, and it appearing by the bill of lading that the cargo must be carried to its destination or no freight would be earned, and that a recovery back of the sum advanced could be had for nonfulfillment of the contract to deliver by carrier.[261] In a New York case the advances were made to the master under the terms of the charter-party not in excess of one-third the freight and in part payment of freight, and it was held that such advance was freight earned, and the insurers were not liable therefor as for freight lost, even though it had been restored to the charterers by the master upon claim made therefor by them.[262] If a cargo is waiting at a port, but a vessel on a voyage there is lost, the contract of the owner of the vessel to transship said cargo entitles him to freight which would have become due, he being

thorities of the port directed the vessel to be burnt for the same cause, and the insurers being proceeded against were first held liable, but this sentence was reversed. In this latter case the defense was rested upon the fault of the captain: Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 17, pp. 348, 349.

[258] See sec. 2732, herein.

[259] De Longeumere v. New York F. Ins. Co., 10 Johns. (N. Y.) 202; Meech v. Philadelphia Ins. Co., 3 Whart. (Pa.) 473; Barclay v. Sterling, 5 Maule & S. 6; Stevens v. Columbian Ins. Co., 3 Caines (N. Y.), 43; Montgomery v. Egginton, 3 Term Rep. 362; De Wolf v. State Mut. F. Ins. Co., 6 Duer (N. Y.), 191; Whitney v. New York Fireman's Ins. Co., 18 Johns. (N. Y.) 208; Davidson v. Willasdy, 1 Maule & S. 313.

[260] De Wolf v. State Mut. F. & M. Ins. Co., 6 Duer (N. Y.), 191.

[261] Minturn v. Warren Ins. Co., 2 Allen (Mass.), 86.

[262] Kinsman v. New York etc. Ins. Co., 5 Bosw. (N. Y.) 460.

in such a situation, with respect to the vessel and cargo, that nothing but a peril insured against prevents his earning freight.[263] If a cargo of cotton is so greatly damaged and injured by a sea peril that it is sold by the consent of the master and shippers at the port of departure, where the vessel has put back because of injuries sustained, and the vessel takes another cargo and proceeds on a different voyage, the insurers on freight are not liable.[264] Again, a vessel under a policy of freight insurance while on her voyage was disabled, unloaded her cargo, and was laid up for repairs, but winter set in and she was unable to proceed on account of the ice, whereupon the master voluntarily surrendered the cargo free of freight to the underwriters of the shippers. It was held that the free surrender was premature, and that no recovery of freight money could be had on the cargo thus surrendered.[265] This subject as to loss of freight is further considered elsewhere.[266]

§ **2782. Hail.** — Insurances are effected upon crops against hail. What constitutes a loss by hail is a question, however, which has not been before the courts, so far as we are able to ascertain.

§ **2783. Hire—Chartered Freight—Delay—Derangement of Machinery or Engines—Want of Repairs.**—If the terms of a charter-party provide that in case the voyage is delayed more than twenty-four working or running hours by reason of the breaking down of engines or machinery, or for want of repairs preventing the vessel working, then the payment of hire shall cease until the vessel is again in an efficient state to prosecute her voyage, and a policy is on freight chartered

[263] Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163; McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 409, per Shaw, C. J.; Davy v. Hallett, 3 Caines (N. Y.), 19; Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346; Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 146, per Shaw, C. J. See chapters on insurable interest herein.

[264] Jordan v. Warren Ins. Co., 1 Story (C. C.), 342.

[265] Allen v. Mercantile Mut. Ins. Co., 44 N. Y. 437; 4 Am. Rep. 700.

[266] See total loss, etc., proximate and remote cause, insurable interest, valuation, etc.

against loss by the perils of the sea, fire, etc., the insurer is liable for a loss of hire immediately caused by a peril insured against, whereby the vessel is delayed beyond the time specified. So the clause of the charter-party is put in operation by the perils of the sea, so as to render the insurers liable, where there is such a derangement or breaking down of the machinery or engines through perils of the sea that it becomes necessary to tow her into port, and she is delayed beyond the time specified. In the cases from which the above statement is deduced one was where the vessel was damaged by fire, a peril insured against, whereby the delay was necessitated; the other was where a peril of the sea caused the breaking of machinery, whereby the delay was rendered unavoidable, yet in both cases the efficient cause of the loss was a peril insured against, and by such peril the clause in the charter-party was put in operation.[268]

§ 2784. "Hull and Machinery" does not Cover "Disbursements."—"Hull and machinery" of a steamship does not cover those things included by "disbursement" policies, such as coals, stores, and expenses.[269]

§ 2785. Improper Navigation of Ship.—In case of an agreement of members of a shipping association to indemnify one another inter alia for "loss or damage of or to any goods or merchandise caused by the improper navigation of the ship," a neglect of the shipowner to efficiently close a loading port before the completion of the loading, whereby the goods are damaged by sea water leaking in during the voyage, is damage by "improper navigation" under the agreement, although the ship is not endangered or her navigation impeded by the leakage.[270]

[267] Mutual Hail Ins. Co. v. Wilde, 8 Neb. 427.

[268] The Bedouin (Eng. C. A. Prob. Div. 1894), 1 L. R. Q. B. D. 1; The Alps (Eng. C. A. Prob. Div. 1893), 1 L. R. Q. B. D. 109.

[269] Roddick v. Indemnity Mut. M. Ins. Co., (1895), 2 L. R. Q. B. D. 380, 384, 385, per Lord Esher, M. R., and Kay, L. J.

[270] Carmichael v. Liverpool Sail etc. Mut. Indem. Assn., 6 Asp. Mar. Rep., N. S., 184. See, also, as to the words "improper navigation," Canada Shipping Co. v. British Shipowners' Mut. Prot. Assn., 6 Asp. Mar. Rep., N. S., 422.

§ 2786. Insolvency of Purchasers of Goods—Annual Returns from Trade—Credit Insurance.—Insurers may become liable for the loss by insolvency or bankruptcy of purchasers of goods, or for the loss of gross annual returns from trade within a limited time or subject to certain conditions, where it is permitted to effect such contracts. The liability will, however, as in other cases, depend upon the observance of the stipulations of the contract, and the insurers will become released by nonobservance.[271] If the policy is against loss only from credit sales to persons rated as to capital and credit in Bradstreet, this does not cover loss by the failure of persons, such as corporations, whose capital is not there rated. This is so held in a New Jersey case.[272]

§ 2787. Insolvency of Debtors—Meaning of "Loss." If a policy stipulates for insurance to an amount not exceeding a specified sum against "loss sustained by reason of the insolvency of debtors owing the insured for merchandise," the word "loss" means the actual loss sustained by reason of such insolvency; that is, not the amount of indebtedness due from the insolvent debtor at the time of his suspension, but the balance remaining due after deducting from the entire indebtedness payments made by the debtor.[273]

§ 2788. Land Dangers—Marine Risks.—As noted elsewhere, the underwriter under marine insurances is not answerable for loss or damage sustained prior or subsequently to the attachment and termination of the risk, and therefore it is a general rule that damages or losses sustained to goods on land are not within the policy, although there are exceptions to this rule in certain cases where during the continuance of the risk the goods are temporarily landed.[274]

[271] Solvency Ins. Co. v. Freeman, 7 Hurl. & N. 17; Solvency Mut. G. Co. v. Froane, 7 Hurl. & N. 5; Solvency Mut. G. Co. v. York, 3 Hurl. & N. 588.

[272] United States Credit System Co. v. Robertson, 29 Atl. Rep. 421; 17 N. J. L. Jour. 209.

[273] Mercantile Credit Guarantee Co. v. Wood, 15 U. S. C. C. A. 563; 68 Fed. Rep. 529.

[274] See Pelly v. Royal Exch. Assur. Co., 1 Burr. 341; Brough v. Whitmore, 4 Term Rep. 406.

§ 2789. **Leakage and Breakage—Marine Risks.**—Losses happening to certain liquids and merchandises through leakage and breakage rest upon the principle that, owing to the peculiar character or intrinsic nature of the commodity, the diminution or damage proceeds from the proper vice of the thing and the insurers are not chargeable, for such ordinary and inevitable loss may happen, however safe the voyage may be. This is the doctrine of all the law-writers, and a distinction is also made between ordinary and extraordinary leakage.[275] So if by the pitching and rolling of heavy seas, the stowage not being faulty, there is extraordinary leakage, as where the contents of casks have been broken out or been wholly or partly emptied, it is a question whether such loss was occasioned by a peril insured against, and if so and no percentage is fixed limiting the insurer's liability, he would be bound for such extraordinary leakage;[276] provided there is no stipulation otherwise. The insurer may in some contracts limit the percentage beyond which he is only liable, and in other policies these losses are expressly excepted, but the insurer may also without doubt, by special agreement, assume such losses. Whether a leakage is natural or ordinary may depend upon whether the voyage is long or short, and also upon the nature of the article taken in connection with the length and character of the voyage.[277] Mr. Arnould says that in England there is no fixed rule as to what shall be considered ordinary leakage and breakage on given articles on a given voyage, and that the forms of policy used in France and other foreign countries generally stipulate the percentage or average amount of liability.[278]

[275] Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 9, pp. 311, 312; c. x, sec. 2, p. 242, citing Valin, Pothier, The Guidon, and The Ordonnance, Louis XIV; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 759, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 722, et seq.; 2 Phillips on Insurance, 3d ed., 619, sec. 1090.

[276] See Crofts v. Marshall, 7 Car. & P. 597, per Lord Denman; Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 9, p. 312.

[277] See Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 9, 311.

[278] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *760, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 723, et seq.

§ **2790. Lightning.**—Damage by lightning without any combustion is not within the terms of a policy providing against losses by fire;[279] for it is declared that it is not sufficient to show where the building is not consumed or set on fire that fire is one of the constituent elements of electricity, but that assured must show that electricity is fire, and that the rending and destruction of the building insured is the result of that particular principle, and that as this cannot be done, damage by lightning is neither ignition or combustion; it is not a loss by fire.[280] Damage caused purely by lightning is not covered by insurance of the property damaged against losses "by fire" or "by reason of fire or by means of fire," [281] and the rending and destruction of the building by lightning, without ignition or combustion, is not a loss "by fire by lightning" within the meaning of such a clause in the policy.[282] Again, if the contract provides for liabilities for "losses on property burned or damaged by lightning, the fact that the building is merely struck by lightning and shattered and damaged does not make the insurers liable.[283] Although if the policy be against "all direct loss or damage caused by lightning," the insured may recover his whole damage where lightning is the proximate cause of the loss; otherwise he may recover only such damages as are directly caused by lightning.[284] But a specific provision for liability for any loss or damage caused by lightning renders the insurers liable for all known effects of lightning, and not merely for losses thereby when ignition or combustion follows, even though the policy also provides against all loss or damage "by fire." [285] And

[279] Kenniston v. Merrimac etc. Ins. Co., 14 N. H. 341; 40 Am. Dec. 193; Scripture v. Lowell etc. Ins. Co., 10 Cush. (Mass.) 356; 57 Am. Dec. 111.

[280] Babcock v. Montgomery Ins. Co., 6 Barb. (N. Y.) 637, per Pratt, J. (a learned and exhaustive discussion on electricity).

[281] Kenniston v. Merrimac etc. Ins. Co., 14 N. H. 341; 40 Am. Dec. 193.

[282] Babcock v. Montgomery Co. Mut. Ins. Co., 4 Comst. (N. Y.) 326; affirming 6 Barb. (N. Y.) 637.

[283] Andrews v. Union Mut. F. Ins. Co., 37 Me. 256.

[284] Beakes v. Phœnix Ins. Co., 54 N. Y. St. Rep. 290; 24 N. Y. Supp. 544; 71 Hun (N. Y.), 613.

[285] Spencer v. Lancashire Ins. Co., 54 Wis. 433.

if the insurance is against loss by fire or lightning between specific dates, agreeing to make good all loss so sustained to assured, his executors, administrators, and assigns, and assured assigns all loss or damage not exceeding his interest in the property, the company cannot, in the absence of some provision therefor, avoid payment on the ground that assured died before the loss occurred.[286] If the lightning is followed by combustion and consequent loss, this is covered by an insurance under a "fire" policy.[287] In some cases decisions relating to losses by lightning have been cited as applicable to cases of explosion by gunpowder, but the court in a Massachusetts decision says such cases bear upon the question of such explosion, if at all, only by a very distant analogy.[288] Where the wording of the policy or contract is sufficiently broad to cover all known effects of lightning, as where it provides for liability against "any loss or damage caused by lightning," this will include a loss by a tornado where the evidence shows a presence in the tornado of electrical disturbance, presenting the usual characteristics of lightning, and such lightning is the active agent in destroying the property, and it is error to grant a nonsuit under such facts.[289] In marine policies, if the subject of insurance is burned by lightning, this is a loss by "fire."[290]

[286] Richardson v. German Ins. Co., 89 Ky. 571; 13 S. W. Rep. 1.

[287] Babcock v. Montgomery Co. Mut. Ins. Co., 4 Comst. (N. Y.) 326; affirming 6 Barb. (N. Y.) 637; Gordon v. Remington, 1 Camp. 123, per Lord Ellenborough; Beaumont on Insurance, 37; Ellis on Fire Insurance, 25.

[288] Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, per Cushing, J., referring particularly to Kenniston v. Merrimac etc. Ins. Co., 14 N. H. 341; 40 Am. Dec. 193; and Babcock v. Montgomery Co. Ins. Co., 4 Comst (N. Y.) 326; affirming 6 Barb. (N. Y.) 637.

[289] Spensley v. Lancashire Ins. Co., 54 Wis. 433 (two judges dissenting).

[290] Gordon v. Remington, 1 Camp. 123, per Lord Ellenborough. Emerigon, referring to "accident from fire," says: "It may have been caused by lightning. . . . . It is not to be doubted that if the accident has happened by lightning or by the fire of enemies it is at the charge of the insurers. . . . . 'The insurers,' says Pothier, 'are bound for fire when it is from a peril (cas fortuit), such as lightning, or that the ship has taken fire in a combat' ": Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 17, pp. 347, 348. Cushing, J., in

§ 2791. Livestock — Slaves.[291] — If livestock is insured during transit, and a part of the stock jumps off the inclined plane over which they are being driven from the cars to a boat, and sustain injuries from which they shortly thereafter die, the insurers are liable.[292] If horses are insured against all risks, including death from any cause whatever, under a voyage policy, the insurers are liable for death caused by bruises brought about by the motion of the ship in heavy seas.[293] Where the owner of a horse is insured against the death of the animal from accident or disease, the insurer is not liable where the horse, which is suffering from an incurable disease, is killed two hours before the expiration of the policy, the killing not being required by an act of mercy, and this is true though the act is authorized by the president and secretary of the company.[294] Livestock or cattle are frequently covered by a policy upon them while "contained in" certain buildings, etc. This question is, however, considered elsewhere. An injury to mules by the escape of steam without fault of the officers of the steamboat is a loss by the peril of the river.[295] While slaves were a subject of commerce, and were capable of being bought and sold, they were considered a legitimate subject of insurance, as goods or merchandise. This traffic being no longer permitted, the cases thereon which are cited below are chiefly valuable because of the principles involved. The early writers class negro slaves and animals under the same head, holding that death of slaves and animals through material causes was owing to the inher-

Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, says, referring to Emerigon, that "the question of loss by lightning is very summarily disposed of in the older authorities by treating electricity as fire from heaven"; but it would seem from the above quotation that Emerigon refers to the "accident from fire . . . . caused by lightning." So, also, Pothier and Meredith in his translation has in connection with the subject the side note "Fire happening through mere chance."

[291] See sec. 2797, herein.

[292] Ætna Ins. Co. v. Stivers, 47 Ill. 86.

[293] Coit v. Smith, 3 Johns. Cas. (N. Y.) 16.

[294] Tripp v. Northwestern Livestock Ins. Co., 91 Iowa, 278; 59 N. W. Rep. 1.

[295] Union Ins. Co. v. Groom, 4 Bush (Ky.), 289.

ent vice of the thing, and not a loss for which insurers were liable except by express agreement, but otherwise if they were drowned in a tempest, killed by the enemy or by jettison, or by any other accident which is a peril within the policy.[296]

§ 2792. **Loss after Termination of Risk Consequent upon Injury During Life of Policy.**—There has been some discussion upon the point whether the insurer is liable for a loss resulting after the termination of the risk from an injury sustained from a peril insured against during the life of the contract. This question involves to some extent the point considered elsewhere as to whether the ship has been moored in "good safety" under a marine risk.[297] If it be assumed that the ship cannot be in good safety at any time after the happening of the accident which is the proximate cause of the loss, one factor in the question ceases to exist, for the risk in such case does not terminate. Thus, where the ship received her death wound during the insured voyage, but was kept afloat by artificial means more than twenty-four hours and foundered in port, sustaining a total loss, it was held that she was not in safety at any time after the accident, and that the underwriters were liable.[298] But in case of an insurance on a ship under a time policy, and three days prior to the expiration of the time she received her death wound, but she was kept afloat by pumping until three days after the time, it was held that the loss had not happened until after the risk ended, and the insurers were not liable.[299] Again, considering the question under marine insurances, the point presented differs from that where the cause of the diminished value of the vessel existed before the ship's arrival, and the actual loss occurred

[296] Emerigon on Insurance, Meredith's ed. 1850, c. xii, secs. 9, 10, pp. 313-16, citing Valin and Pothier; Summers v. United States Ins. & T. Co., 13 La. Ann. 504; Moore v. Perpetual Ins. Co., 16 Mo. 98; Gregson v. Gibbert, 3 Doug. 232; Tatham v. Hodgson, 6 Term Rep. 656.

[297] See secs. 1537-46, herein.

[298] Shaw v. Felton, 2 East, 109.

[299] Meretony v. Dunlop, cited in Lockyer v. Offley, 1 Term Rep. 260. See comment on this case in Knight v. Faith, 15 Q. B. 649, per Lord Campbell, C. J.

from a totally different cause arising after the termination of the risk; as where a vessel under a time policy was damaged and kept afloat until moored safely, although it was necessary to keep the pumps going while her cargo was being discharged, and she was subsequently taken to dry dock for surveys and repairs, where, after the time limit of the risk had ended, she was destroyed by fire, and it was held that there could be a recovery for the diminished value of the vessel arising from the sea damage, and that the expenses for repairs could be considered in ascertaining the sum.[300] It is also held that if an injury is occasioned within the time covered by the policy, which results in a total loss after the expiration of the policy, the insurer is liable for the actual injury arising within the time of the policy.[301] In a New York case, under a policy insuring horses against all risks, including death from any cause whatever, it was held that insured was entitled to recover the value of a horse that was injured on the voyage by reason of heavy seas, so that he died three days after landing, the court declaring that the question was, How much damage might have been ascertained at the time he was landed?[302] If the extent of the damage sustained during the continuance of the risk cannot be ascertained until after the risk ends, there seems no reasonable ground on which the insurer can avoid responsibility for the loss according to the fact, whether it be partial or total.[303] Thus, where the damage so sustained and ascertained depreciated the vessel's value one-half, it was held that the insurers were liable as for a total loss.[304] So where the proximate cause of the loss was the stranding of the vessel during the term covered, and the vessel was got off, carried into the harbor, examined, and sold,

[300] Lidgett v. Secretan, 40 L. J. Com. P. 257; 6 L. R. Com. P. 616; reversing in part 39 L. J. Com. P. 196; 5 L. R. Com. P. 190.

[301] Howell v. Cincinnati Ins. Co., 7 Ohio, pt. 1, 284.

[302] Coit v. Smith, 3 Johns. Cas. (N. Y.) 16.

[303] Lidgett v. Secretan, 40 L. J. Com. P. 257; 6 L. R. Com. P. 616; reversing in part 39 L. J. Com. P. 196; 5 L. R. Com. P. 190; Furneaux v. Bradley, reported in 2 Marshall on Insurance, ed. 1810, 584; Park on Insurance, 166.

[304] Peters v. Phœnix Ins. Co., 3 Serg. & R. (Pa.) 25.

there being no abandonment, this was held a partial loss recoverable from the underwriters.[305] In case of an insurance upon a man's life for a specified time, it is undoubtedly true that if some short time before the term expires he receives a mortal wound, of which he dies after the term, the insurer is not liable.[306] Although an insurance of this character has been compared with and declared to rest upon the same principles as those governing a time policy on a ship,[307] nevertheless the two cases do not rest upon the same principle, so far as the question here under consideration is concerned, for in the case of the ship the injury received is from a peril insured against, and the insurance is against loss or damage from certain perils, while in case of the life risk the insurance is against loss from the death itself, not against death when resulting from or caused by certain perils or diseases, injuries, or accidents. In accident policies it is generally provided that the insurer is only liable where the death occurs within a specified time, as ninety days after or from the time the accident happens.[308]

§ **2793. Same Subject—Conclusion.**—In cases therefore, where the insurance is against loss arising from or occasioned by certain perils, the question might reasonably be held to depend largely upon the factor of proximate and remote cause; for if the ship be clearly injured within the life of the policy by a peril insured against, and the injury is of such a character that the loss resulting or rather consummating after the end of the risk is an inevitable consequence of

[305] The court in this case said substantially that under a time policy, if the damages be sustained by a peril insured against during the life of the risk, and the amount of loss be not ascertained until after the term, and the vessel is kept afloat till then by proper measures, by giving notice of abandonment or by obtaining evidence of the sum required for repairs, there exists no valid reason why there should not be a recovery for a total or partial loss according to the facts: Knight v. Faith, 15 Q. B. 649; 19 L. J. Q. B., N. S., 509.

[306] Examine Howell v. Knickerbocker L. Ins. Co., 3 Rob. (N. Y.) 232.

[307] 1 Marshall on Insurance, ed. 1810, *264, adopting the words of Willes, J., in Lockyer v. Offley, 1 Term Rep. 260.

[308] See Perry v. Provident L. etc. Co., 103 Mass. 242; 99 Mass. 162; Northrup v. Railway Pass. Assur. Co., 43 N. Y. 518.

such prior injury, such resulting loss will form an element in ascertaining the amount of damages, for it is an evidential fact as to the condition of the subject insured at the end of the risk and in the premises, and is of conclusive force.[309] Under a fire risk the loss is said to occur at the time of the fire, though the point involved here is not discussed.[310]

§ 2794. Mortgage—Unmarketableness by Reason of Liens, Defects of Title, etc.—If a policy is issued on a mortgage against loss from its unmarketability, by reason of the possibility of mechanics' or municipal liens, excluding actual losses by reason of such liens, the loss only covers liens then existing and inchoate at the date of the policy.[311]

§ 2795. When Mortgagee's Insurance not Affected by Mortgagor's Acts.—The mortgage clause making the mortgagee payee, and stipulating that the insurance should not be invalidated by the mortgagor's acts or neglect, constitutes an independent contract between said mortgagee and insurer, and in such case the subject matter of the insurance is the mortgagee's insurable interest, and not the real estate, and the risk

[309] "If certain consequences will inevitably result after the expiration of the period of the policy from the operations of the perils insured against during the period, they are surely proper subjects of indemnity"; 1 Phillips on Insurance, 3d ed., 684-86, sec. 1148. Mr. Parsons is of opinion that the insurers are liable in case of such injury during the period of the risk from a peril insured against, and a loss after the end of the risk, "where the ultimate loss was not only the effect of the injury so sustained, but an effect so direct, immediate, and inevitable that the injury must be deemed to be the proximate and only cause of the loss, ... if insured property be injured by a peril insured against, the insurers are liable for the direct and immediate consequences whenever or wherever these may occur"; but he qualifies this by the words, "Possibly a distinction might be made in this respect between policies on time and those on a voyage": 2 Parsons on Marine Insurance, ed. 1868, 65, 66. See Arnould on Marine Insurance, Perkins' ed. 1850,*754; 1 Arnould on Marine Insurance,*411, *451; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 372.

[310] Johnson v. Humboldt Ins. Co., 91 Ill. 92.

[311] Wheeler v. Real Estate Title Ins. etc. Co., 160 Pa. St. 408; 23 Ins. L. J. 475; 28 Atl. Rep. 849.

will be avoided by any acts of the mortgagor, whether done prior or subsequently to or at the time of the issue of the policy.[312]

§ 2796. **Overheating without Combustion.**—If fire is used for culinary and heating purposes, or for the purpose of generating power, the fire being confined within the limits of certain agencies for producing heat, or if it is used by chemists, artisans, and manufacturers as a chemical agent or as an instrument of art or fabrication, or for any of the other numerous purposes of like character, and if in such cases it is used or applied by design, and a loss occurs in consequence of overheating or by unskillfulness or negligence of the operator, and his mismanagement of heat as an agent or instrument of manufacture or other useful purpose, this is not a loss within a fire policy. To this extent the rule is law.[313] Whether this rule may be extended beyond this point is a question. There is authority for the proposition that a fire policy does not cover damage without combustion by overheating; that there must in such case be an actual ignition or burning; that the fire must operate upon the subject insured, as distinguished from a loss occasioned by the action of heat within the limits of some one or more of the usual and proper agencies for producing heat. This extension of the rule would certainly be reasonable and in accord with the authorities. The qualification, or rather explanation, is added that the identical property insured need not be ignited or consumed, for if there is ignition of part of the insured property or of other near-by property, or of the building or some part thereof, and an injury, of which fire is clearly the proximate cause, is sustained by the remainder of the identical property insured, or by the whole or some part thereof, this would certainly be a loss by fire, even though there is no actual ignition

[312] Hanover F. Ins. Co. v. Bohn (Neb. 1896), 67 N. W. Rep. 774.

[313] Scripture v. Lowell etc. Ins. Co., 10 Cush. (Mass.) 356; 57 Am. Dec. 111, per Cushing, J., an exhaustive discussion of Austin v. Drew, 4 Camp. 361; Holt N. P. 126; 6 Taunt. 436; 2 Marsh. 130; St. John v. American Mut. F. Ins. Co., 11 N. Y. 516, per Denio, J.; Beaumont on Insurance, 37.

of the property so damaged, and we believe that with such qualification the above rule is the true one.[314] The rule

[314] See Everett v. London Assur. Co., 19 C. B., N. S., 126, per Byles, J.; Austin v. Drew, 6 Taunt. 436; 4 Camp. 360; Holt N. P. 126, per Gibbs, C. J.; Waters v. Louisville Ins. Co., 1 McLean (C. C.), 275; Sohier v. Norwich F. Ins. Co., 11 Allen (Mass.), 336; Millaudon v. New Orleans Ins. Co., 4 Rob. (La.) 15; Brown v. Kings Co. F. Ins. Co., 31 How. Pr. (N. Y.) 508; Babcock v. Montgomery Ins. Co., 16 Barb. (N. Y.) 637, per Pratt, J.; Ellis on Fire Insurance, 273; Steph. N. P. 1079; 11 Petersd. Abr. 18. So in case of a policy against fire on a steam vessel, her hull, machinery, etc., the court says: "Of necessity fire was to be maintained in the furnace and in contact with the boiler as means to generate motive power by which the vessel could be propelled. The burning or warping of the bars of the grate in the furnace, though produced by the action of fire, could hardly be supposed to be within the scope of the risk insured against, however general the terms of the policy. And if that be true of the furnace, it is difficult to perceive why it is not equally true of such parts of the boiler as are brought in contact with the fire in the furnace or the heat evolved therefrom. The fire, while in the furnace, was in its proper place and where it was intended to be, and it was placed there to act upon the boiler, which in course of time would be burned out or warped, as the grate in the furnace would be, by the continued action of the fire therein, and if such results of the action of fire upon these materials while in ordinary use are not within the risk, it would be difficult to say upon what degree of heat or under what conditions the liability under the policy would attach for injury caused by the action of fire while confined to the furnace and producing no external ignition. If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace of such intense heat as to crack his chimney or to warp or crack his mantelpieces, it could hardly be contended that he could hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of fire. In such case the fire would not have extended beyond the proper limits within which it was intended to burn, but the heat emitted therefrom would have produced effects not intended by the insured. No doubt there are many instances where the insurer has been held liable for injury done to buildings and furniture by heat or smoke without actual ignition, where the heat or smoke has proceeded from fire outside of and beyond the limits of the place where it was intended by the contract of insurance to burn. But that is a different question." In this case it was sought to recover damage to the interior of the boiler occasioned by the overheating of the boiler from the furnace fires, owing to absence of water in the boiler, and not as the result of fire outside the furnace: American Towing Co. v. German F. Ins. Co., 74 Md. 25; 21 Atl. Rep. 353, per Alvry, J.

above given does not confine the loss to actual burning or consuming, but all losses are covered which are proximately or immediately caused by the fire or combustion; as in case of loss by water to extinguish the fire.[315] A loss by lightning unaccompanied by combustion is not a loss by fire.[316] And where a boiler exploded from excessive heat, this was held not a loss within the policy.[317]

[315] Geisek v. Crescent Mut. Ins. Co., 19 La. Ann. 297; City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; Babcock v. Montgomery Ins. Co., 6 Barb. (N. Y.) 637.

[316] Kenniston v. Mer. Mut. Ins. Co., 14 N. H. 341. See Babcock v. Montgomery Ins. Co., 6 Barb. (N. Y.) 637.

[317] Millaudon v. New Orleans Insurance Co., 4 La. Ann. 15, Cushing v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, for an exhaustive discussion of Austin v. Drew, 4 Camp. 361; Holt N. P. 126; 6 Taunt. 436; 2 Marsh. 130. *Opinions of Text-Writers in the Above.*—Mr. Wood says: "Where fire is employed as an agent either for the ordinary purposes of heating the building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof so long as the fire itself is confined within the limits of the agencies employed; as from the effects of smoke or heat evolved thereby or escaping therefrom from any cause, whether intentional or accidental. In order to bring such consequences within the risk there must be actual ignition outside of the agencies employed, not purposely caused by assured, and these as a consequence of such ignition dehors the agencies": 1 Wood on Fire Insurance, 2d ed., 236, sec. 103, citing Austin v. Drew, 4 Camp. 361; Millaudon v. New Orleans Ins. Co., 4 La. Ann. 15; Kenniston v. Insurance Co., 14 N. H. 341; Perrin v. Protection Ins. Co., 11 Ohio, 146; Grim v. Phœnix Ins. Co., 13 Johns. (N. Y.) 451; Jameson v. Royal Ins. Co., 7 Ir. L. R. 126; Geisiek v. Crescent etc. Ins. Co., 19 La. Ann. 297; Babcock v. Montgomery etc. Ins. Co., 6 Barb. (N. Y.) 637. The case of Austin v. Drew, 4 Camp. 637, is mainly relied on by Mr. Wood, but Mr. May does not give such a construction to that case; in fact, he does not deduce therefrom any rule which would extend beyond that noted at the beginning of this section: 2 May on Insurance, 3d ed. sec. 402; and he cites the case of Austin v. Drew, as reported in 6 Taunt. 436, and note thereto; 1 Benn. F. I. Cas. 104; Case v. Hartford Ins. Co., 13 Ill. 676, per Trumbull, J.; Balestracci v. Fireman's Ins. Co., 34 La. Ann. 844; Sohier v. Norwich F. Ins. Co., 11 Allen (Mass.), 336; Brown v. Kings Co. F. Ins. Co., 31 How. Pr. (N. Y.) 508. Mr. Ostrander has merely adopted Mr. Wood's rule: Ostrander on Fire Insurance, ed. 1892, 367, sec. 165. Mr. Phillips says: "If fire is the efficient cause, and if the loss is its direct effect, the underwriters are liable": 1 Phillips on Insurance, 3d ed., 624, 625, sec. 1097.

§ 2797. Perils of the Seas and Rivers—Dangers of Navigation.—Perils of the sea include accident or misfortunes of which sea damage is the proximate or efficient cause; that is, those losses occasioned by extraordinary circumstances such as stress of weather, winds, tempests, storm and waves, rocks, sands, shoals, foundering or sinking at sea, striking against a sunken rock, stranding, shipwreck, etc., but does not cover loss arising from ordinary circumstances of the voyage or from sea damage, or from wear and tear which without any extraordinary circumstances is to be expected. It is not confined to damage caused only by the sea, but covers damage of a character to which a marine adventure is subject, or perils which sustain to such adventures a special or peculiar relation.[318] "Perils of the sea are from storms and waves, rocks, shoals, and rapids, other obstacles though of human origin, changes of climate, the confinement necessary at sea, animals peculiar to the sea, and all other dangers peculiar to the sea." [319] In all marine policies a distinction should be observed between those injuries, losses, and damages which arise from or are occasioned by mere wear and tear which is to be expected, and those which arise from some extraordinary cause. A loss which may not be covered by the policy in the former case may, even though of the same character, render the insurers liable in the latter case. It is certainly true that no liability rests upon the insurer for any deteriora-

And Mr. Marshall's opinion is that there must be actual ignition: 2 Marshall on Insurance, 3d ed., 790, noted more fully in next section.

[318] Coles v. Marine Ins. Co., 3 Wash. (C. C.) 159; Bullard v. Roger Williams Ins. Co., 1 Curt. (C. C.) 148, per Curtis, J.; Hazard v. Insurance Co., 1 Sum. (C. C.) 218; 8 Pet. (U. S.) 557; The Gulnare, 42 Fed. Rep. 861; Fletcher v. Inglis, 2 Barn. & Ald. 315; Miller v. California Ins. Co., 76 Cal. 145; 18 Pac. Rep. 155; The Mangalore, 23 Fed. Rep. 462; 9 Saw. (C. C.) 17; Rohl v. Parr, 1 Esp. 445; The Schooner Reeside, 2 Sum. (C. C.) 571; Thames & Mersey M. Ins. Co. v. Hamilton, L. R. 12 App. C. 484; Potter v. Suffolk Ins. Co., 2 Sum. (C. C.) 197. But see secs. 2816, 2817, on stranding.

[319] Deering's Annot. Civ. Code Cal., sec. 2197; Abbott on Shipping, 6th ed., 384, n. See note 41 Am. Dec. 287-90, as to what is included in perils of the seas.

tion in the ship, her rigging, furniture, and apparel, arising from what is to be reasonably expected from the service in which she is employed.[320] The general rule under the authorities is that above stated, and it may also be generally stated, to make the insurer liable, the injury must have been occasioned by a disaster or injury that would injure a seaworthy vessel.[321] Dangers of navigation mean those perils that are incident to it in a lawful course of it, but not those that arise from pursuing an unlawful course therein.[322] The mere fact, shown by the assured, that the goods after arrival were found damaged by sea water is not evidence of a loss by perils of the sea.[323] If goods shipped in good order and condition are damaged by sea water, it is for the ship to show that

[320] "The loss of an anchor," says Valin, "by the fretting of a cable against the rocks, which have broken and cut it, is not a damage arrived by a peril of the sea. It is a natural consequence of the service of things destined to the use of the vessel. In the same way no demand can be made on the insurers for what the vessel has lost of value by additional service, or for rigging or sails worn; so the ship being at anchor, if the cables are worn, parted, or are cut by the effect only of currents or the vessel's swinging. It would be different if the violence of the winds or waves obliged them to cut the cables or caused them to part; and so if the wind carried away a sail, or a yard, or a spar": Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 9, pp. 312, 313. This rule is, however, not considered quite satisfactory by Marshall, who makes the test that of the ordinary employment of the ship under the rule governing average contributious: 2 Marshall on Insurance, ed. 1810, *492, *493. Mr. Arnould states substantially the same rule as Emerigon, but he also distinguishes between ordinary and extraordinary causes of damage, or those occasioned by the direct and violent operations of one of the perils insured against, and says that "whenever the loss can, upon a fair review of all the circumstances, be imputed to the ordinary wear and tear of the voyage, the underwriter is exempt from liability": 2 Arnould on Marine Insurance, Perkins' ed. 1850, *756, et seq., *758; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 720, et seq.; citing Benecke on the Principles of Indemnities, 451, 456; Stevens on Average, 8th ed., 160, 166, 168; Covington v. Roberts, 2 Bos. & P. 378; Fawcus v. Sarsfield, 6 El. & B. 199; as cited by Blackburn, J., in Dugeon v. Pembroke, L. R. 9 Q. B. 581.

[321] Flemming v. Marine Ins. Co., 4 Whart. (Pa.) 59; Pandorf v. Hamilton, 16 Q. B. D. 629, per Lopes, L. J.

[322] Atwood v. Reliance Trans. Co., 9 Watts (Pa.), 87; 34 Am. Dec. 503.

[323] Flemming v. Marine Ins. Co., 3 Watts & S. (Pa.) 144.

the damage was occasioned by a "peril of the sea."[324] So where a cargo of kainit is put on board a ship in good order and is put off damaged, the ship must show the loss to have resulted from "a peril of the sea" if she would escape liability.[325]

§ **2798. Same Subject—What Losses are Covered.**—A loss to cargo may be attributed to a peril of the sea if there are no circumstances from which to infer an improper stowage, and the voyage is a very stormy one.[326] Damage to goods in the hold, caused by sea water, shipped during extraordinary stress of weather is loss by perils of the sea.[327] Injury to a cargo of a flatboat by her springing a leak, caused by a heavy swell raised by the boats passing each other, is a loss by a peril of the sea, even though the steamboat was one of ordinary size and the swell only an ordinary one for such steamboats.[328] If mules prudently stationed on board are injured by an escape of steam without fault of the officers of a steamboat, it is a peril of the river.[329] So where cattle are put upon a lighter to be landed according to the usual way, owing to an insufficiency of water on the bar, and are secured as customary in such cases, but becoming violent they break away and a number are thrown overboard and drowned, it is held a loss by a peril of the sea.[330] If the charter-party provides that in case of the breaking down of machinery, whereby the ship is delayed over twenty-four running hours, the hire shall cease until she is again able to prosecute the voyage, and the policy was on freight chartered against loss by perils of the sea, etc., and within the term of the risk the thrust shaft parted, whereby the vessel was delayed for twenty-eight days, the perils of

[324] The Lydian Monarch, 23 Fed. Rep. 298.

[325] Tygert Co. v. The Charles I. Sinnickson, 24 Fed. Rep. 304.

[326] The Fern Holme, 24 Fed. Rep. 502.

[327] Baker v. Manufacturers' Ins. Co., 12 Gray (Mass.), 603.

[328] Washington Mut. Ins. Co. v. Reed, 20 Ohio, 199.

[329] Union Ins. Co. v. Groom, 4 Bush (Ky.), 289. See next section.

[330] Anthony v. Ætna Ins. Co., 1 Abb. (C. C.) 343; citing The Reeside, 2 Sum. (C. C.) 567; Garrison v. Memphis Ins. Co., 19 How. (U. S.) 312; Potter v. Suffolk Ins. Co., 2 Sum. (C. C.) 197; Garrigues v. Coxe, 1 Binn. (Pa.) 592.

the seas are the immediate cause whereby the clause in the charter-party is put in operation, and insurers are liable.[331] If by the breaking of a mast-coat in a storm the hold is flooded, this is a peril of the sea, although the exercise of proper skill and diligence should lead to the discovery of rust on a cargo of iron, and secure repairs within a reasonable time.[332] And where a cargo is damaged by a peril of the sea, and not by neglect of the ship, the libel was dismissed.[333] If the navigation is partly by fresh and partly by salt water, and it is necessary to transship the goods, that being contemplated, it is a loss by the perils of navigation if damage of any kind by water is sustained, even wetting caused by rains, the goods being on the wharf in course of transshipment. In such case damage from water in consequence of improper storage, unless such improper storage is occasioned or acquiesced in by the insured or his agent, is damage from the perils of navigation.[334] If a vessel arrives in bad condition, having open seams and butts in her deck and top sides, and an opening in her bow port, and she was seaworthy and in good condition when leaving port for her voyage, and was subject on the voyage to a severe storm of several days by which she was greatly impeded, making only twelve miles a day, all of which appears by a preponderance of evidence, the damage to her cargo will be held to have been caused by the weather, even though several inspectors testify upon examination after arrival that she must have been in bad condition when she sailed.[335] Injury to cotton which is wet by being thrown from the deck into the river by the sudden careening of a steamboat is a peril of the sea within the meaning of a policy of marine insurance, notwithstanding the careening of the boat may have resulted from the negligence or unskillfulness of those engaged in unloading her. To relieve from liability because of acts of the master and crew there must be want of

[331] The Bedouin (Eng. C. A. Prob. Div. 1894), 1 L. R. Q. B. D. 1; The Alps (Eng. C. A. Prob. Div. 1893), 1 L. R. Q. B. D. 109.

[332] The Nith, 36 Fed. Rep. 86.

[333] Fowler v. The Bertram L. Townsend, 35 Fed. Rep. 797.

[334] Underwriters' Agency v. Sutherlin, 55 Ga. 266.

[335] The Piscataqua, 35 Fed. Rep. 622.

good faith and honesty of purpose.[336] The injury that vessels lying in the harbors may sustain by lying badly on the ground, taking the ground by the ebbing of the tide, is not attributable to any inherent weakness or defects, or mere wear and tear, but to some extraordinary cause; as by striking their bottoms against some hard substance, or malposition or overlaying the dock.[337] A loss by shipwreck, whether the vessel has become a mere mass of floating material without form as a ship, or has become so far shattered as to be irreparably damaged and no longer capable of navigation, except at a cost in excess of her worth when repaired, or has become greatly injured and shattered, but may be repaired at a sum less than her value.[338] If a river steamboat runs upon a bar, and being taken off she is leaking badly, her seams having opened, and she is breached upon another bar to prevent her sinking, and is there destroyed by the river rising, this is a

[336] Crescent Ins. Co. v. Vicksburg etc. Packet Co., 69 Miss. 208; 30 Am. St. Rep. 537.

[337] Potter v. Insurance Co., 2 Sum. (C. C.) 197; Hagar v. New England etc. Ins. Co., 59 Me. 460; Petre v. Phœnix Ins. Co., 132 N. Y. 137; 43 N. Y. St. Rep. 479; 45 Alb. L. J. 419; 30 N. E. Rep. 380; 21 Ins L. J. 551; Kingston v. Marshall, 8 Bing. 158.

[338] 2 Arnould on Marine Insurance, ed. 1850, *795, sec. 296; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 747; 2 Marshall on Insurance, ed. 1810, *488. See chapter on total and constructive total loss and abandonment herein. Emerigon says that there are two sorts of shipwreck (naufrage): 1. When the vessel is totally submerged; 2. When being stranded on shore the sea fills up her interior but she does not absolutely disappear. He also says the Ordonnance distinguishes between shipwreck (naufrage) and bris; that bris is absolute or partial—the first, when the vessel strikes a rock or other object the vessel is broken up and ceases to exist as such; the second, "when the vessel lets in water by being violently thrown against a foreign body. If this opening to the water occasions neither shipwreck nor stranding, it is simple average; but if this partial bris is accompanied by shipwreck or stranding, it is then a total loss (sinistre majeur)." Meredith, however, says the Ordonnance does not explain the distinction between bris and shipwreck, and that the text (Emerigon's) makes it no clearer; that "bris, literally rendered, is a breaking. 'Se brisco' is to be broken, in being thrown violently against any object. This term has no correlative in English law or custom, unless it be when it is said a vessel has struck": Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 12, pp. 317, 318, and note.

loss by a peril of the river.[339] In an Indiana case the defendant issued a policy to plaintiff "against loss or damage by fire . . . . on his wharf-boat, tackle, and apparel lying at the wharf at the city of Evansville, Indiana, ... and to receive, discharge, and store freight, hazardous, extra-hazardous, and especially hazardous," providing "that the loss, if any, shall be adjudged according to the conditions herein contained and those hereto attached." The conditions were as follows: "Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers and assailing thieves." It was held that the company was liable for the destruction of the boat by floating ice.[340] Where a lost kedge so fouled the anchor as to wrap it around the chain and cause the anchor to lose its hold, and the ship having been anchored a number of days suddenly in the night begins dragging, this is an accident due to sea peril.[341]

§ 2799. **Same Subject—What Losses are not Covered.** The fact that the goods insured were damaged by sea water when delivered is not of itself evidence of loss by perils of the sea.[341a] Where the vessel encounters storms of only ordinary severity, the vessel not appearing to have been strained or injured, it is not proof that a loss of the cargo was caused by a peril of the sea.[342] And the encountering of heavy seas and rolling heavily is not a peril of the sea.[343] Damage to insured goods by sea water is not a "peril of the sea" if occasioned by bad stowage, want of pumping, or defectiveness of the vessel;[344] nor is a loss by embezzlement of specie,[345] nor the sale of cargo at a port of necessity or distress to obtain money for

[339] The Natchez, 42 Fed. Rep. 169.

[340] Franklin Ins. Co. of Indianapolis v. Humphrey, 65 Ind. 549; 32 Am. Rep. 78.

[341] The Carl Frederick, 33 Fed. Rep. 589.

[341a] Flemming v. Marine Ins. Co., 3 Watts & S. (Pa.) 144; 38 Am. Dec. 747.

[342] The Mangalore, 23 Fed. Rep. 462; 9 Saw. (C. C.) 17.

[343] The Gulnare, 42 Fed. Rep. 861.

[344] Flemming v. Marine Ins. Co., 3 Watts & S. (Pa.) 144; 38 Am. Dec. 747.

[345] Hicks v. Fitzsimmons, 1 Wash. (C. C.) 279.

the vessel, the sale being necessitated by the damaged condition of the goods,[346] and this is true even though the damage to the ship is caused by a sea peril, the repairs being such as the ship-owner, a common carrier, is bound to make;[347] nor loss by the ship's springing a leak owing to her being eaten or damaged by worms, which in certain waters ordinarily assail and enter the bottom of vessels, and which is not an extraordinary occurrence or peril;[348] nor a loss by rats, where the ship is detained in a port at which she touches by sickness of the crew,[349] losses by rats and worms not being generally considered as within ordinary wear and tear; nor ordinary wear and tear which is expected where the sole cause of the damage is the insufficiency of the ship to bear the ordinary stress of the voyage;[350] nor under the California code,[351] nor under the law of marine insurance generally, a loss caused by the explosion of a boiler and the vessel's becoming thereby unmanageable and sinking;[352] nor bilging and other damage where the vessel was hove down on the beach within the tideway to be repaired.[353]

§ 2800. Personal Injuries to Employees—Liability for Losses Paid.—An insurer contracting for indemnity

[346] Ruckman v. Louisville Underwriters' Ins. Co., 5 Duer (N. Y.), 342; Powell v. Gudgeon, 5 Maule & S. 431; Dyer v. Piscataqua F. & M. Ins. Co., 53 Me. 118; Sarquy v. Hobson, 2 Barn. & C. 7; 4 Bing. 131; 12 Moore, 474; 3 Dowl. & R. 192; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351; Nesbitt v. Lushington, 4 Term Rep. 183.

[347] Dyer v. Piscataqua F. & M. Ins. Co., 53 Me. 118, and see cases in last note.

[348] Rohl v. Parr, 1 Esp. 444; Hazard v. New England Ins. Co., 8 Pet. (U. S.) 557; 1 Sum. (U. S.) 218; Martin v. Salem M. Ins. Co., 2 Mass. 420; Dale v. Hall, 1 Wis. 181.

[349] Aymar v. Astor, 6 Cow. (N. Y.) 266; Hunter v. Potts, 4 Camp. 203. See Laverony v. Drury, 8 Exch. 166.

[350] Coles v. Marine Ins. Co., 3 Wash. (C. C.) 159; Magnus v. Buttemer, 11 Com. B. 876; 21 L. J. Com. P. 119; Taylor v. Curtis, 6 Taunt. 608; Stevens on Average, 8th ed., 161, 167, 168; Benecke on the Principles of Indemnities, 456.

[351] See sec. 000, ante.

[352] Miller v. California Ins. Co., 76 Cal. 145; 18 Pac. Rep. 155; Thames & Mersey M. Ins. Co. v. Hamilton, L. R. 12 App. C. 484. See West India etc. Co. v. Home & Colonial Ins. Co., 6 Q. B. D. 51. But see preceding chapter.

[353] Thompson v. Whitmore, 3 Taunt. 227.

to assured for losses paid employees for injuries sustained while engaged in operations of a designated character, connected with a specified business at a particular named place, is not liable for losses paid by assured to employees while engaged in work of a character other than that specified, even though it is customary for parties in such business to do such work.[354] But where an employer insured himself against liability for claims for personal injuries to his employees while engaged in "operations connected with the business of iron and steel works," it was held that in such a case the policy would cover injuries received by an employee by reason of the construction of a building by the employer for the use of his business.[355] A contract insuring an employer from liability for claims for personal injuries to his employees is a contract of indemnity, and payment by the employer of a judgment obtained against him is not a condition precedent to the assurer's liability.[356]

§ 2801. "Personal Injury and Loss of Human Life" Caused by Explosion—Recovery Back of Money Paid therefor by Insured.—If the insured contracts for indemnity for money paid out by him, for which he is liable "for personal injury and loss of life" when caused by said boilers or any machinery of whatever kind connected therewith and operated thereby, and if an explosion is directly caused by reason of the fact that a steam pipe connected with the boilers heated and operated a starch kiln, the assurer is liable for the amounts paid out by assured for loss of life and injuries caused by said explosion.[357]

[354] People's Ice Co. v. Employees' Liability Assur. Corp. of London (Lim.), 161 Mass. 122; 36 N. E. Rep. 754.

[355] Hoven v. Employer's Liability Assur. Corp. (Wis. 1896), 67 N. W. Rep. 46.

[356] Hoven v. Employer's Liability Assur. Co. (Wis. 1896), 67 N. W. Rep. 46.

[357] Chicago Sugar Refining Ins. Co. v. American Steam-Boiler Co., 48 Fed. Rep. 198; 21 Ins. L. J. 59. It will be noted that in stating the above rule we have used the words "if an explosion be directly caused by," etc. In the case cited and relied on the explosion was held to have been "directly" caused, but if there is any doubt upon

§ 2802. Personal Injuries to Several by One Cause Constitutes Separate Accidents and not One Accident.—If one cause operates upon several at one time, this is not one accident, but each individual injured is a separate accident, within the meaning of an insurance contract in a specified sum against liability to pay claims for personal injuries or damages caused by accidents by vehicles of assured, and the amount specified applies to each separate accident, and not to all of them as one accident.[358]

§ 2803. Personal Injuries to Persons not Employees—Liability for Losses Paid.—If an insurer contracts for indemnity to assured for losses paid persons not employees for injuries sustained by reason of accidents resulting from the use of particular kinds of vehicles specified, the insurer is not liable for losses occasioned by the use of a vehicle which is not one of the kind designated, although under particular circumstances it is customary to use such vehicles temporarily.[359]

§ 2804. Pirates, Rovers, Assailing Thieves—Marine Risks.—Piracy, under the statutes both in England and here, includes various acts not within the common-law definition, which latter comprehends acts of robbery and depredation committed upon the high seas, and which if perpetrated on land would be a felony. It is a brigandage, a cruising at sea and plundering of ships without authority, differing herein from acts of cruising at sea by privateers lawfully commissioned by authority of a sovereign state, or of a de facto government exercising sovereign powers and recognized as a

the point whether it was "directly" caused or not, see chapter herein on excepted risks and losses by fire. This would not change the rule in the text, for the principle is undoubtedly correct. This case is reversed as to the point that under the facts the fire was not the proximate cause of the loss, but that the explosion was merely an incident of the fire; 57 Fed. Rep. 294; 21 L. R. Annot. 572.

[358] South Staffordshire Tramways Co. v. Sickness etc. Assur. Assoc., 60 L. R., N. S., 260.

[359] Phillipsburg Horsecar Co. v. Fidelity & Casualty Co. of New York, 160 Pa. St. 350; 28 Atl. Rep. 823.

belligerent, exercised against declared enemies, and being acts of hostility in so far as they are confined within the limits and purposes contemplated under the law of nations by the authority granted, but a privateer may commit acts of robbery and piracy upon the high seas.[360] Contracts calculated to encourage fitting out of privateers by neutrals in a neutral port, and cruising against one belligerent under another belligerent's flag, are unlawful and void.[361] Acts done under a commission by a government in fact exercising supreme power within its jurisdiction, with resources of men and money and engaged in war, and recognized as a belligerent, are not acts of piracy or of assailing thieves.[362] Mutiny of the crew will render insurers liable under a clause as to pirates and rov-

[360] Emerigon on Insurance, Meredith's ed. 1850, c. xii, secs. 28, 35, 27, pp. 412, 437, 441, et seq.; 2 Marshall on Insurance, ed. 1810, *556, et seq.; Rev. Stats. U. S., secs. 2324, 5323-25, 5368-76; 1 Hawk. P. C. 98-100. See The Savannah Pirates, 5 Wheat. (U. S.) 184; Dole v. New England M. M. Ins. Co., 2 Cliff. (C. C.) 421; 6 Allen (Mass.), 373; United States v. Kessler, Bald. (C. C.) 27; Davisons v. Sealskins, 2 Paine (C. C.), 324; The Antelope, 10 Wheat. (U. S.) 67; United States v. Palmer, 3 Wheat. (U. S.) 610; Monongahela Ins. Co. v. Chester, 43 Pa. St. 491; Jose Ferreira Dos Santos Case, 2 Brock. (C. C.) 507; United States v. Haskell, 4 Wash. (C. C.) 402; Swinnerton v. Columbian Ins. Co., 37 N. Y. 174; 9 Bosw. (N. Y.) 361; United States v. Demmarchi, 5 Blatchf. (C. C.) 85; The Malek Adhel, 2 How. (U. S.) 210; The Joseph Segunda, 5 Wheat. (U. S.) 338; United States v. Smith, 5 Wheat. (U. S.) 153; Dole v. Merchants' Mut. M. Ins. Co., 51 Me. 465; The Marianna Flora, 11 Wheat. (U. S.) 1; Le Louis, 2 Dod. 210; United States v. Tully, 1 Gall. (C. C.) 247; United States v. Klintock, 5 Wheat. (U. S.) 144; Manson v. Insurance Co., 6 Wall. (U. S.) 1; United States v. Baker, 5 Blatchf. (C. C.) 6; United States v. Howard, 3 Wash. (C. C.) 344; The Exchange v. McFladden, 7 Cranch (U. S.), 147; Fifield v. Insurance Co., 47 Pa. St. 166; United States v. Jones, 3 Wash. (C. C.) 200; L'Invincible, 1 Wheat. (U. S.) 252; United States v. Peters, 3 Dall. (U. S.) 127; United States v. Furlong, 5 Wheat. (U. S.) 184. For definition of piracy, see article by Francis Wharton, "Insurgents as Belligerents," 33 Alb. L. J. 125.

[361] Pond v. Smith, 4 Conn. 127.

[362] Dole v. New England M. M. Ins. Co., 2 Cliff. (C. C.) 394; 6 Allen (Mass.), 373; Manson v. Insurance Co., 6 Wall. (U. S.) 1; Fifield v. Insurance Co. of Pennsylvania, 47 Pa. St. 166; Dole v. Merchants' M. Ins. Co., 51 Me. 465; Monongahela Ins. Co. v. Chester, 43 Pa. St. 491. But see United States v. Klintock, 5 Wheat. (U. S.) 144.

ers.[363] So also of a loss of a cargo of corn caused by a mob taking possession of a vessel lying in harbor and running her upon a reef.[364] But it may be a question for the jury whether the act was done by a mob, or as an act of war and of hostility, where a vessel lying in harbor was seized and sunk by men professing to act under authority of the state of Virginia during the Civil War.[365] The wrongful seizure and sale of a cargo by a consul of the United States is not covered by the clause "pirates and assailing thieves."[366] It is held in Tennessee that the word "thieves" does not render the insurers liable for a loss by simple theft, but only by robbery,[367] while in New York "thieves" is held to cover a loss by simple larceny, as well as by "assailing thieves."[368] And in a line within this decision it is also held in another case in the same state that the insurer against loss by "thieves" is liable for thefts by persons not connected with the vessel, whether furtive or violent.[369]

[363] Brown v. Smith, 1 Dow, 349. See Naylor v. Palmer, 10 Exch. 382; 23 L. Ex. 323; 8 Exch. 739. But see Dixon v. Reed, 3 Barn. & Ald. 197. As to what acts of seamen or officers and crew are piracy, see Rev. Stats. U. S., sec. 5369; United States v. Gilbert, 2 Sum. (C. C.) 19.

[364] Nesbitt v. Lushington, 4 Term Rep. 783, per Lord Kenyon.

[365] Swinnerton v. Columbian Ins. Co., 37 N. Y. 174; 9 Bosw. (N. Y.) 361. See Babbitt v. Sun etc. Mut. Ins. Co., 23 La. Ann. 314.

[366] Paddock v. Commercial Ins. Co., 2 Allen (Mass.), 93.

[367] Marshall v. Insurance Co., 1 Humph. (Tenn.) 99.

[368] American Ins. Co. v. Bryan, 1 Hill (N. Y.), 25; 26 Wend. (N. Y.) 563; 37 Am. Dec. 278. The policy here was against ":"thieves," etc., "barratry of the master and mariners." See 3 Kent's Commentaries, 303.

[369] Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.), 295. See De Rothschild v. Royal M. S. P. Co., 7 Exch. 734; 14 Eng. L. & Eq. 327; Boudritts v. Hentigg, Holt N. P. 149; 1 Phillips on Insurance, 3d ed., 642, sec. 1106. Emerigon notes two kinds of theft: "Simple theft, called 'furtum,' and theft accompanied with violence, called 'latrocinium.' The first is not placed in the rank of perils cas fortuits; the law presumes that it might have been prevented by vigilance; 'furtum non est casus fortuitus,' says Cujus. The second is considered as a case fatal, which could neither be foreseen nor prevented, latrocinium fatale damnum seu casus fortuitus est. Hence it follows: 1. That the insurers are not responsible for simple theft committed on board the vessel, because it is presumed with reason that the accident has happened through the fault of the captain or

§ **2805. Passage Money—Loss of.**—If passage money for the transportation of passengers is insured, said money being paid for in advance for the entire voyage, and the ship is never heard of after sailing, the owners are liable to refund said passage money to the representatives of the deceased, and the insurers are liable therefor.[370] But the loss of passage money by an unjust claim prosecuted by passengers and followed by a decree at a port of necessity is held not a loss for which the underwriters are liable, even though the decree was justified by the evidence.[371] So insurers are not liable for the cost in excess of the passage money of maintaining passengers at a port of necessity consequent upon delay for repairs.[372]

§ **2806. Profits.**—In determining the liability of insurers for a loss on profits in marine risks, there should be borne in mind the difference between the rule in this country and that in England, since the former does not require proof that profits would have been realized had the goods arrived,[373] while in England some proof to that effect is necessitated.[374] And, as stated elsewhere, the insured may recover a total or an average loss on profits, according as the loss of the goods is total or partial.[375] So that if an insurance be effected upon profits valued, and the cargo having arrived is

crew": Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 29, p. 419; and to same effect see 3 Kent's Commentaries, 303, n.; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 822, *818; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 771.

[370] Ogden v. Mutual Ins. Co., 35 N. Y. 418.

[371] Marks v. Nashville Co., 6 La. Ann. 127.

[372] Willis v. Cooke, 5 El. & B. 641; 25 L. J. Q. B. 16.

[373] Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; Alsop v. Commercial Ins. Co., 1 Sum. (C. C.) 451; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222; Abbott v. Sebor, 2 Johns. Cas. (N. Y.) 39; Fosdick v. Norwich Ins. Co., 3 Day (Conn.), 108. See French v. Hope Ins. Co., 16 Pick. (Mass.) 397.

[374] Hodgson v. Glover, 6 East, 316. See Barclay v. Cousins, 2 East, 544.

[375] Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39; 2 Am. Dec. 139; Putnam v. Mercantile Ins. Co., 5 Met. (Mass.) 391. See sec. 1019 herein. See total loss and constructive total loss.

lost by a peril insured against before the goods can be landed, the insurers are liable, even though it is not shown that profits would have been realized had no peril intervened.[376] But the assured cannot sell his goods and then recover from the underwriters for a loss on the profits.[377] Under an open policy where the ship was captured, but five-eighths of the goods were restored, it was held, an abandonment being made as for a total loss on profits, that insured was entitled to recover three-eighths as a partial loss, and it was also held in this case that insured was entitled to share pro rata.[378] It may be stated as a rule that if profits are not specially insured they cannot be recovered as such.[379] And in such case insured cannot recover under a fire risk, as a part of the damages, profits of a business which are not realized at the time of the loss, such damages being too remote and difficult to ascertain, even approximately. Thus, a loss of tolls sustained by the insured on its road while a bridge destroyed by fire is rebuilding is not covered by a policy on the bridge. "If the bridge was totally destroyed, the loss would be the total amount of the insurance, but if only partially destroyed, it would be the value of the injury. Under no circumstances can there be a legitimate measure of liability on a fire insurance policy which represents the loss of profits of a business which might be carried on at the structure destroyed if it were standing. Such is not the contract of the parties," and the court also said that there could be no recovery "for any other advantage which may have been denied from its use." [380] Nor does a policy on a building cover a loss of profits during repairs.[381] But insurance under fire policies may cover, by express stipulation, profits unearned because of the destruction by fire of property, by the use of which they may have been secured; for the

[376] Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222.

[377] Tom v. Smith, 3 Caines (N. Y.), 245.

[378] Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36.

[379] See sec. 1760, herein. But see Holbrook v. Brown, 2 Mass. 280.

[380] Farmers' Mut. Ins. Co. v. New Holland Turnpike Road, 122 Pa. St. 37; 15 Atl. Rep. 563.

[381] Wright v. Pale, 1 Ad. & E. 621; Niblo v. North American F. Ins. Co., 1 Sand. (N. Y.) 551.

right to profits is an insurable interest, capable of supporting the contract of profits as the inevitable result of the destruction of property by fire; as in the case of royalties.[382]

§ **2807. Profits of Lessee.**—If a lessee insures his interest, he is entitled in case of loss to the profits lost, owing to the suspension of rent under his sublease.[383]

§ **2808. Promise of Insurer to Pay although Loss not Covered by Policy.**—If property is insured and the loss thereto is not covered by the policy, it is held that the insurers may render themselves liable to pay therefor upon the performance of certain conditions to which the parties have agreed at the time of making the promise to pay; for although such promise is void when made, yet the performance constitutes a consideration which relates back to the making of the promise; as where the insurers promise the assured that if he will find the damaged property, have it inspected, and sold at auction, they will pay the deficiency, and assured performs these acts, it has been declared that he is entitled to recover the deficiency.[384]

§ **2809. Promissory Note.**—Insurers may become liable for the loss where it affects a policy guaranteeing the prompt payment of a promissory note, the statute under which the company is organized permitting such insurances to be effected, and the form of the contract is immaterial and the policy negotiable.[385]

§ **2810. Railroad, Right to Recover from, although Insurance Paid.**—The fact that a party has recovered in-

[382] Employer's Liability Assur. Corp. v. Merrill, 155 Mass. 404; 29 N. E. Rep. 529; National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535; 13 N. E. Rep. 337.

[383] Carey v. London Provincial F. Ins. Co., 33 Hun (N. Y.), 315.

[384] Willetts v. Sun etc. Ins. Co., 45 N. Y. 45.

[385] Ellicote v. United States Ins. Co., 8 Gill & J. (Md.) 166. This case, however, could not be strictly called one of insurance.

surance for a loss of his property by fire will not prevent him from recovering from a railroad company, whose negligence caused the fire, the entire amount of his loss.[386]

§ 2811. **Removal of Goods in Case of Threatened Fire —Damages and Expenses Incurred.**—Although there has been some question on this point, yet the rule seems to be this, that if the danger from fire to the insured goods or to the building in which they are contained is so imminent that a prudent uninsured person would, under the circumstances, hardly have omitted the precaution to remove his goods from the building, then the insured will also be justified in using such reasonable precaution to protect them from the impending or threatened peril, exercising in their removal such care as, under the circumstances, a prudent uninsured man could reasonably be assumed to have used, and insurer is liable, within the limits of this rule, even though the building be not actually consumed or burned, for the loss, damage, and injury sustained by their removal, as well as for such expenses incurred in their removal as are reasonable under the circumstances.[387] And the rule applies even though the policy is

[386] Lake Erie & W. Ry. Co. v. Griffin, 8 Ind. App. 47; 35 N. E. Rep. 396. Examine Hart v. Railroad Co., 13 Met. (Mass.) 99, per Shaw, C. J.; Railroad Co. v. Commercial Union Ins. Co., 139 U. S. 223; 11 Supr. Ct. Rep. 554, per Gray, J.; Chicago etc. R. R. Co. v. Pullman S. C. Co., 139 U. S. 79; 11 S. C. Rep. 490, per Harlan, J.; Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 320; 6 Supr. Ct. Rep. 1176; Railroad Co. v. Jurey, 111 U. S. 584; 4 Supr. Ct. Rep. 566; Weber v. Railroad Co., 35 N. J. L. 409.

[387] White v. Republic etc. Ins. Co., 57 Me. 91; 2 Am. Rep. 22; Thompson v. Montreal Ins. Co., 6 U. C. Q. B. 319; Leibner v. Liverpool etc. Ins. Co., 6 Bush (Ky.), 630; 99 Am. Dec. 695; Fireman's Ins. Co. v. May, 20 Ohio. 211; Holtzman v. Franklin F. Ins. Co., 4 Cranch. (C. C.), 295; Balestracci v. Fireman's Ins. Co., 34 La. Ann. 844; Talaman v. Home etc. Ins. Co., 16 La. Ann. 426; Whitehurst v. Fayetteville Mut. Ins. Co., 6 Jones L. (N. C.) 352. See Wood's Mayne on Damages, sec. 442; Case v. Hartford F. Ins. Co., 13 Ill. 676. See sec. 2821, on theft and fire risk. "The insurer is liable where the thing insured is rescued from a peril insured against that would otherwise have caused a loss if in the course of such rescue the thing is exposed to a peril insured against which permanently deprives the insured of its possession, in whole or in part;

"on goods whilst they shall be and remain in said building."[388] So where there was a furious fire in the neighborhood and the building was burned to some extent and a stock of frangible goods was considerably damaged and broken by removal, the company was held liable, even though the property burned would have neither burned or have been injured if it had been left in the house.[389] Again, where there was a conflagration and the building being in imminent danger of destruction the goods were removed from the store to the pavement, where they were injured, the insurers were held liable for the damage sustained as well as for expenses of removal.[390] The court in this case says: "The question presented is one of considerable difficulty, and one upon which the authorities are at variance. While the supreme court of Illinois, in a case like the one at bar, have held that the underwriters are liable for the damage to the goods and the expense of removing them, the court in Pennsylvania have denied their liability.[391] We think the liability of the underwriters in these and similar cases depends very much upon the imminence of the peril and the reasonableness of the means used to effect the removal. . . . . The imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods; it must be such as to inspire a conviction that to refrain from removing the goods would be a violation of a manifest moral duty; the damage and expense of removal, too, must be such as might reasonably be incurred under the circumstances of the occasion.[392] When such a case exists, we think it the better opinion to hold that the underwriters are chargeable for the damage and expense of removing the goods, as this result seems most in accordance with reason, the analogies of the law, and public policy."

or where a loss is caused by efforts to rescue the thing insured from a peril insured against": Deering's Annot. Civ. Code Cal., sec. 2627.

[388] Holtzman v. Franklin F. Ins. Co., 4 Cranch (C. C.), 295.

[389] Balestracci v. Fireman's Ins. Co., 34 La. Ann. 844.

[390] White v. Republic etc. Ins. Co., 57 Me. 91; 2 Am. Rep. 22.

[391] Case v. Hartford Ins. Co., 13 Ill. 676; Hillier v. Alleghany Ins. Co., 3 Pa. 470. But see Agnew v. Insurance Co., 3 Phila. (Pa.) 193.

[392] Angell on Fire Insurance, sec. 117.

§ 2812. **Same Subject—Duty of Assured—Stipulation.** If the policy stipulates that assured shall, in case of exposure of the insured goods to loss or damage by fire, use all possible diligence to preserve the property, or that he shall labor for the protection thereof, and that insurer shall not be liable for losses arising from failure or neglect so to do, the question as to the necessity for removal is dependent upon the circumstances existing at the time. If the danger of destruction from the threatened peril is so imminent, direct, and immediate that it would be gross negligence for the assured not to effect its removal, then the assurer is responsible, whether loss or damage is reasonably and necessarily sustained by such removal, for the fire will then be regarded as the proximate cause of the loss. So also if the danger is reasonably imminent, within the limits of the rule stated under the last section, the assured would not only be justified in removing the goods to protect them from threatened loss, but would be obligated under a stipulation of the kind above mentioned to use reasonable efforts in removing the goods.[393] So where goods insured under a policy containing a like clause were being removed during a dark night and sustained damage by flood, mud, and water, the insurers were held liable therefor.[394]

§ 2813. **Same Subject—How far Assured must Exert Himself to Save Property.**—In cases where there is no stipulation, although the rule as to removal of goods or other efforts to save property cannot be more strictly enforced than as stated under the last section, nevertheless the assured is obligated to act in good faith, and to do all that he can to lighten the burden of probable or possible loss, and to exert himself to save, as far as he reasonably can, the property from threatened destruction, but in applying this rule all the circumstances of the particular case must be considered. The assured ought not to negligently or carelessly stand by and permit the destruction of the property by the peril insured

[393] Case v. Hartford F. Ins. Co., 13 Ill. 676; Brady v. Northwestern Ins. Co., 11 Mich. 425. See last section and under sec. 2821, theft.

[394] Talamon v. Home & Citizens' Mut. Ins. Co., 16 La. Ann. 426.

against, or the injury or damage to said property by others, when it is in his power to avert the same by the exercise of ordinary prudence, such as an uninsured man would use under the same circumstances. To do so would, as a general rule, be an evidence of that want of honesty and good faith which parties to contracts of insurance are presumed to exercise. No arbitrary rule can, however, be laid down which will govern all cases.[395] So in marine insurances the master and crew, as a part of their bounden duty to the ship in the capacity in which they are employed, must see the ship through the hazards of the voyage, and bestow their best efforts and entire possible service for the preservation of the ship and cargo.[396]

§ **2814**. **Rents.**—Unless otherwise stipulated, if the premises are destroyed by fire there is no liability for rent of the premises; the liability of the insurer, if the building is never restored, is not for the loss of the use or rental of the property, but for the value of the loss.[397] But the insurance even though a fire policy may expressly provide for indemnity for the loss of rents by failure of tenants to promptly pay the same, and also from the loss of rents during a specified period occasioned by a peril specified, or it may insure the tenant against loss from liability to pay rent.[398] If the policy insures against a loss of rents from a specified building not exceeding four months in any one year, and the term of the policy was for one year, terminating June 7, 1891, and there was a total loss of the building by fire on June 5, 1891, the insured may recover the loss of the rent for the four months specified.[399]

[395] See last two sections and sec. 2081, sue and labor clause, etc.; 2 Wood on Fire Insurance, 2d ed., 1056, sec. 492.

[396] Miller v. Kelly, Abb. Adm. 564, per the court; Schooner John Perkins (U. S. C. C. Mass.), 21 L. R. 87, per Curtis, J.

[397] Farmers' Mut. Ins. Co. v. New Holland Turnpike Road, 122 Pa. St. 37; 15 Atl. Rep. 563, per Green, J.

[398] "Fire insurance is now made to cover rents lost by the destruction of buildings by fire": Employer's Liability Assur. Corp. v. Merrill, 155 Mass. 404; 29 N. E. Rep. 529, per Barker, J. See sec. 2820, herein.

[399] Becker v. Merchants' Mut. Ins. Co. (C. of A. Parish of New Orleans, 1893), 22 Ins. L. J. 227.

§ **2815. Ship-owner's Liability.**—To the extent that the shipowner may protect his interests and cover his liability by insurance he should do so, and the nature and extent of that liability may therefore be briefly considered here. At the common law the shipowner is responsible up to the full extent of the damage or loss caused to goods or to another ship by the acts of the master and mariners, and this is the rule also of the civil law and of England and this country, except so far as legislative provisions provide otherwise.[400] In England, however, the responsibility of shipowners has been limited by legislative enactments.[401] So also in the United States under the acts of Congress there are certain limitations on the shipowner's liability.[402] Under the act of 1851,[402a] the destruction of goods on land by fire communicated by a vessel is not an included liability, even though the vessel is duly licensed and engaged in the coast trade.[403] A loss of goods by fire on board the vessel upon which they are shipped, the fire happening by the neglect of the corporation owning the vessel, is not a loss incurred

[400] Abbott on Shipping, 6th Am. ed., 394, and notes; Maclachlan on Shipping, 121, et seq.; 3 Kent's Commentaries, 5th ed., 217; 1 Arnould on Marine Insurance, Perkins' ed. 1850, *775; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 734.

[401] 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 734, citing Shipping Act, 17 & 18 Vict., c. 104, sec. 503; 25 & 26 Vict., c. 63, secs. 54, 55; Preamble 7 Geo. II, c. 15; Gale v. Lawrie, 5 Barn. & C. 163, per Lord Tenterden; Brown v. Wilkinson, 16 L. J. Ex. 36, per Parke, B.

[402] See Rev. Stats. U. S., secs. 4282, 4284, 4285. The act of Congress (Act of June 19, 1886, 24 U. S. Stats., p. 80) extending the limited liability of owners to all vessels is not retroactive, nor is the act which excepts lighters from the limited liability of shipowners (Act of March 3, 1851, 9 U. S. Stats., p. 635; Rev. Stats. U. S., sec. 4283 repealed by the act of June 26, 1884; 23 U. S. Stats., p. 57; Chappel v. Beadshaw, 35 Fed. Rep. 923.

[402a] Acts of March 3, 1851; 9 U. S. Stats., p. 635; Rev. Stats. U. S., sec. 4283, limiting the liability of shipowners to their interest in the vessel and pending freight "for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or occurred without the privity or knowledge of such owner or owners."

[403] Goodrich Transportation Co. v. Gagnon, 36 Fed. Rep. 123.

without the privity or knowledge of the owners of the vessel under the United States Statutes of 1851, chapter 43, limiting the liability of shipowners.[404] The act of Congress of 1884,[405] limiting the individual liability of a shipowner for any debt contracted on account of the ship, does not affect the liability of owners of fishing vessels, which remains as at common law.[406] Exactly where the responsibility of the owner or master as carriers of goods commences and ends is not definitely determined, the matter being largely dependent upon the practice and customs of particular ports or places where the voyage begins and ends.[407] Where a common carrier by water is notified that the goods are perishable, and must not be put out in rainy weather; and he places the property on the dock on a day unsuitable for landing and cartage because raining during the greater part thereof, and without reasonable notice to the consignee, to enable him to have them weighed, carted, and protected from the weather, the carrier is guilty of negligence, and is liable for a breach of his duty. Although a carrier by water may land goods on a wharf, it is his duty to give the consignee due notice of their arrival and landing, and afford him a reasonable time to take charge of and secure them. The consignee has also a reasonable time to inspect goods on the wharf before he determines whether he will accept them. Time, place, the character of the weather, and other circumstances are all material factors, and until acceptance, such as to release the carrier, the latter must take charge of them for the owners. The acts of acceptance, upon notice or otherwise, may, however, be such as to relieve the carrier of responsibility.[408] A carrier by water is not excused from

[404] Hill Mfg. Co. v. Providence etc. Steamship Co., 113 Mass. 495; 18 Am. Rep. 527.

[405] U. S. Stats. 1884, c. 121, sec. 18.

[406] Simpson v. Story, 145 Mass. 497; 14 N. E. Rep. 641.

[407] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *778.

[408] McAndrew v. Whitlock, 52 N. Y. 40; 11 Am. Rep. 657; Richardson v. Goddard, 23 How. (U. S.) 28; Salmon Falls Mfg. Co. v. Bark Tangier (U. S. C. C. Mass.), 21 L. R. 6; Goodwin v. Baltimore & Ohio R. R. Co., 50 N. Y. 154; 10 Am. Rep. 457; Schooner Treasurer,

liability for loss by the act of God operating upon an unseaworthy vessel, when such act would have proved harmless to a seaworthy vessel.[409] And it is held that the owners of a tugboat are not common carriers, and that they are bound only by ordinary care.[410] The owners are not liable for any injury caused by a defect in the tackle arising from the ordinary wear and tear, unless a knowledge of such defect is brought home to them.[411] Goods should not be improperly stowed,[412] and the carrier is liable if they are.[413] Thus, it is bad and improper stowage to stow bags of ripe seed over chalk in the hold of a vessel,[414] or salt over iron, so that water may chance to come through.[415] So damage to goods from other goods stowed in the hold is held chargeable to the general owners of a ship.[416] The general owners of a vessel are not liable for damages occasioned by a collision happening through the fault or negligence of the master of the vessel, who controls her pro hac vice and is sailing her "on shares." [417]

Sprague, 473; Northern v. Williams, 6 La. Ann. 578; Vose v. Allen, 3 Blatchf. (U. S.) 289; Goddard v. Bark Tangier, 21 L. R. 12; Hyde v. Trent Nav. Co., 5 Term Rep. 389; Price v. Pavell, 3 Comst. (N. Y.) 322.

[409] Packard v. Taylor, 35 Ark. 402; 37 Am. Rep. 37.

[410] Arctic F. Ins. Co. v. Austin, 69 N. Y. 470; 25 Am. Rep. 221; Hays v. Miller, 77 Pa. St. 238; 18 Am. Rep. 445; Varble v. Bigeley, 14 Bush (Ky.), 698; 29 Am. Rep. 435. That a towboat is a common carrier, see Bussey v. Mississippi Valley Trans. Co., 24 La. Ann. 165; 13 Am. Rep. 120.

[411] Thus, the owners of a vessel are not liable to the employee of a stevedore who has full charge of the unloading of the vessel for injury to the employee caused by defective tackle furnished by the vessel, when it is shown that the tackle had no apparent defect, and that the stevedore was an experienced and competent one who had the exclusive employment of his laborers and control of the work: Riley v. State Line Steamship Co., 29 La. Ann. 791; 29 Am. Rep. 349.

[412] As to goods carried on deck, see Wood v. Phœnix Ins. Co., 1 Fed. Rep. 235.

[413] Alston v. Herring, 11 Exch. 822.

[414] The Bitterne, 35 Fed. Rep. 927.

[415] The Nith, 36 Fed. Rep. 86, 383.

[416] Gillespie v. Thompson, 6 El. & B. 477, in note to Baxter v. Leland, 1 Blatchf. (C. C.) 526.

[417] Somes v. White, 65 Me. 542; 20 Am. Rep. 718.

§ 2816. Stranding Defined—Marine Risk.—Stranding is where the ship takes ground or strikes some obstruction to navigation, such as a rock or reef or submerged piles, and is arrested and remains fixed for some space of time, or settles, being forced thereto by some accidental or extraneous cause, or by some unusual, extraordinary, and unexpected casualty, or by force of the winds or seas, and not a grounding caused solely by those natural causes necessarily incident to the ordinary and usual course of navigation; as in case of the ebb and flow of the tide in tide rivers or harbors. It is also distinguished from a mere temporary stoppage; as where the ship merely strikes or runs against or into some obstruction, but is not fixed or settled, but passes on. This is not a stranding, and the degree of damage sustained by the ship is important in determining whether there has been stranding.[418] But if the consequences of the stranding are such as not to be capable of adjustment, because so indefinite that no estimate or evidence can be given as to the damage sustained, there is no liability therefor on the part of insurers.[419] Stranding may also be voluntary; as where the ship is intentionally run aground in what appears the least perilous place to escape a more pressing danger, such as shipwreck, an enemy, foundering, or sink-

[418] Lake v. Columbus Ins. Co., 13 Ohio, 48; 42 Am. Dec. 188; McDougle v. Royal Exch. Assur. Co., 4 Camp. 283; 1 Stark. 130; 4 Maule & S. 503, per Lord Ellenborough; Potter v. Insurance Co., 2 Sum. (C. C.) 197; Wells v. Hopwood, 3 Barn. & Ald. 26, 34, per Lord Tenterden; Fletcher v. Inglis, 2 Barn. & Ald. 315; Litchford v. Oldham, L. R. 5 Q. B. D. 538; Mitchell v. Gray, 1 Shaw & D. 298; Magnus v. Buttemer, 21 L. J. Com. P. 119; 11 Com. B. 876; 16 Jur. 480; Kingsford v. Marshall, 8 Bing. 458; 1 Moore & S. 657, per Tinsdale, C. J.; Baker v. Torry, 1 Stark. 436; Raynor v. Goodmound, 5 Barn. & Ald. 225; Harman v. Vaux, 3 Camp. 429; De Mattos v. Saunders, 7 L. R. Com. P. 570; Thompson v. Murison, 6 C. C. S. 1120; 16 Scot. Jur. 491; Herne v. Edmonds, 1 Brod. & B. 388; 4 Moore, 15; Carruthers v. Sydebotham, 4 Maule & S. 77; Corcoran v. Gurney, 1 El. & B. 456, per Lord Campbell; Bishop v. Pentland, 7 Barn. & C. 219; 1 Man. & R. 49; Dobson v. Bolton, reported in 1 Marshall on Insurance, ed. 1810, *240; Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 13, p. 323, et seq.

[419] Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456; Sage v. Middletown Ins. Co., 1 Conn. 239.

ing, the object being the common safety or the general benefit.[420]

§ **2817. Stranding — Cases.** — It is a stranding where the ship is forced by the wind into a mud bank and remains two hours;[421] or where having her head moved she is forced by the wind to so change her position that at the ebbing of the tide she is greatly strained and springs a leak;[422] or where breaking a rope at her moorings, it being an unforeseen accident, she falls over on her side;[423] or where she runs on piles under water a short space from shore and remains until cut away;[424] or where a vessel, being forced by stress of weather and leaking takes ground, founders on making port and is fixed there;[425] or where having suffered the loss of her anchors and masts she is taken in tow by sailors and placed on the bank, where she lies over on her side for several tides.[426] So also if she is forced upon a rock and is there fixed even though for only about fifteen minutes;[427] or where being necessary to draw off the water to repair artificial inland navigation the vessel grounds on piles not known to be there;[428] or where

[420] See Barrow v. Bell, 4 Barn. & C. 736; 7 Dowl. & R. 244; Burnett v. Kensington, 7 Term Rep. 210; 1 Esp. 416; Bradhurst v. Columbian Ins. Co., 9 Johns. (N. Y.) 9; Corcoran v. Gurney, 1 El. & B. 1456; The Star of Hope, 9 Wall. (U. S.) 203, per Clifford, J.; Caze v. Reilley, 3 Wash. (C. C.) 298; Mutual Ins. Co. v. Cargo etc., Olc. Adm. 89; Bales of Cotton, 8 Blatchf. (C. C.) 221; Stringess v. Cary, 2 Curt. (C. C.) 59; Bevan v. Bank of United States, 4 Whart. (Pa.) 301; Columbian Ins. Co. v. Ashby, 13 Pet. (U. S.) 331; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191; Fowler v. Rathbones, 12 Wall. (U. S.) 102; Meech v. Robinson, 4 Whart. (Pa.) 360; Bedford Com. Ins. Co. v. Parker, 2 Pick. (Mass.) 1; Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 13, p. 324. See chapter on general average.

[421] Harman v. Vaux, 3 Camp. 429.

[422] Wells v. Hopwood, 3 Barn. & Adol. 20.

[423] Bishop v. Pentland, 7 Barn. & C. 219; 1 Man. & R. 49. See Carruthers v. Sydebotham, 4 Maule & S. 77.

[424] Dobson v. Bolton, reported in 1 Marshall on Insurance, ed. 1810, *240.

[425] Mitchell v. Gray, 1 Shaw & D. 298.

[426] De Mattos v. Saunders, 7 L. R. Com. P. 570.

[427] Baker v. Towry, 1 Stark. 436.

[428] Raynor v. Goodmond, 5 Barn. & A. 225.

for the common safety she slips her cables and under sail enters a tide harbor at low water, and is grounded and floats only about eight days during the month;[429] or where she springs a leak by running upon an anchor upon entering a harbor of necessity, and upon being moored she is warped higher up to prevent sinking and takes the ground.[430] It is not a stranding if a ship strikes and bilges and passes without stopping;[431] nor where she strikes a rock and remains there about a minute and a half;[432] nor where she takes ground in a tide harbor on the ebbing of the tide, either after being moved or while entering, this being incident to the ordinary course of navigation.[433]

§ **2818. Sue and Labor Clause—Rescue Clause—Marine Risk.**—The object of this clause was to enable the assured to do that which it was formerly assumed he could not do without losing his right to abandon; that is, to take every measure necessary for the preservation and recovery of the property, and this it is his duty to do under the stipulation, the underwriters being bound to contribute to the charges under a Lloyd's policy, where there are several subscriptions, "each one according to the rate and quality of his sum herein assured."[434] Under the suing and laboring clause the under-

[429] Corcoran v. Gurney, 1 El. & B. 456; 22 L. J. Q. B. 113.

[430] Barrow v. Bell, 4 Barn. & C. 736; 7 Dowl. & R. 244.

[431] Lake v. Columbus Ins. Co., 13 Ohio, 48; 42 Am. Dec. 188.

[432] MacDougle v. Royal Exch. Assur. Co., 1 Stark. 130; 4 Maule & S. 503; 4 Camp. 283.

[433] Hearne v. Edmonds, 1 Brod. & B. 388; 4 Moore, 15; Magnus v. Buttemer, 21 L. J. Com. P. 119; 11 Com. B. 876; Kingsford v. Marshall, 8 Bing. 458; 1 Moore & S. 657.

[434] One form used in San Francisco is as follows: "In case of any loss or misfortune resulting from any peril insured against, the party insured hereby engages for himself or themselves, his or their factors, servants, and assigns, to sue, labor, and travel, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof, and also to use all proper and legal means to recover, through general average or otherwise, from any parties interested in hull, freight, or cargo, either or all sums due to the vessel or its owners on account of sacrifices, losses, or expenses incurred for the general safety or common good, to the charges whereof this company will contribute in pro-

writers are liable for a proportion of any reasonable expenses incurred in preserving the property from the operation of the perils insured against,[435] and for expenses incurred in attempting to recover the property in addition to the payment of a total loss;[436] but under this clause assurers are not liable where there is no necessity to defend safeguard or recover property; as in case where expense is unnecessarily incurred in employing a tug in searching for boats reported adrift, which had not in fact gone adrift but were tied up in a safe place.[437] The clause has references to charges not covered by the insurance, and where expenditures are incurred to repair losses caused by the risks insured against, such as for temporary repairs to make the vessel seaworthy, she being safe in port, these are not covered.[438] Nor is insured bound to defend an attempt to condemn property captured, but he may abandon on notice thereof.[439] The question is whether such reasonable and proper means were used for the safety, care, preservation, and recovery of the property as a prudent uninsured owner would have used under the circumstances, and not whether all the care was used that possibly could have been exercised, or whether the plan pursued was the best one that could have been adopted.[440] In the case of memorandum articles of one

portion as the sum insured is to the whole sum at risk, nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster be considered as a waiver or an acceptance of abandonment": See Mitchell v. Edie, 1 Term Rep. 608; Kidson v. Empire Ins. Co., L. R. 1 Com. P. 535; L. R. 2 Com. P. 357, per Willis, J.; Booth v. Gair, 33 L. J. Com. P. 99. The master's duty is not only to navigate the ship in favorable weather, but it is his duty in adverse weather inducing shipwreck to exert himself to save as much of the ship and cargo as he can. This is a part of his bounden duty in his character as seaman of that ship: The Neptune, 1 Hagg. Adm. 236, per Lord Stowell.

[435] Cory v. Boylston F. & M. Ins. Co., 107 Mass. 140; 9 Am. Rep. 14.

[436] Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412. See Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456; 32 Am. Dec. 271; Providence & S. S. S. Co. v. Phœnix Ins. Co., 89 N. Y. 562.

[437] Barney Dumping Boat Co. v. Niagara F. Ins. Co., 14 U. S. C. C. A. 408; 67 Fed. Rep. 341.

[438] Alexandre v. Sun Mut. Ins. Co., 51 N. Y. 253. See Lohre v. Atchison, 2 Q. B. D. 509.

[439] Gardere v. Columbian Ins. Co., 7 Johns. (N. Y.) 514.

[440] Franklin Ins. Co. v. Cobb, 2 Cinc. Supr. Ct. 87.

species, such as hides, the underwriters are not liable for salvage under the sue and labor clause, unless perhaps an actual loss of the cargo may have been prevented by the salvage.[441] Although where there was a partial loss under the ten per cent, excepted by the warranty free from average, and expenses were incurred to save the goods under the sue and labor clause, the insurers were held liable for such expenses.[442] Nor is the liability that of particular average under such clause.[443] Where the insured was obligated to labor for the safeguard and recovery of a steamboat in case of accident, the expense incurred in launching the boat, which has run upon a bar or flat and is in danger of loss, was held to be at the charge of the insurer.[444] Insurers have no right by virtue of this clause to take possession of the ship and make permanent repairs; the clause has reference only to relief from present peril and temporary care,[445] although if the assured fails to recover and repair, the insurers after the disaster may do so.[446] Neither expenses for ascertaining the amount of the loss nor expenses of refitting the property for market are covered.[447] Expenses incurred in saving or preserving sea damaged goods whereby a loss to the insurers is diminished is covered by this clause.[448] The insurers have the undoubted right to save and restore the vessel and render it certain that there is no total loss, and if they act in good faith they are entitled to reimbursement for their expenses out of the vessel or the insured under a rescue clause giving the underwriters the right "to interfere and save the vessel" in case of loss or misfortune, and in case the insurance is "against total loss only, and no claim for the same is sustained, then the whole of such expenditure and the amount paid or incurred by insurers should be a lien upon the vessel,

[441] Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415.
[442] Schultz v. Ohio Ins. Co., 1 B. Mon. (Ky.) 336.
[443] Kidston v. Empire Ins. Co., L. R. 1 Com. P. 535.
[444] Dix v. Union Ins. Co., 23 Mo. 57.
[445] Gloucester Ins. Co. v. Younger, 2 Curt. (C. C.) 322.
[446] Cincinnati Ins. Co. v. May, 20 Ohio, 211.
[447] Cory v. Boylston F. & M. Ins. Co., 107 Mass. 140; 9 Am. Rep. 14.
[448] Kidston v. Empire M. Ins. Co., L. R. 1 Com. P. 535.

and recoverable against the vessel or insured at the option of the insurers." [449]

§ **2819. Telegraph Cable.**—An insurance upon the Atlantic telegraph cable to "cover and include the successful working of the cable when laid and all and every danger, accident, and risk that may be incurred on sea or on land in all and any boat, ship, and craft whatsoever and wheresoever until the final, complete, and successful laying" thereof from shore to shore, does not render the insurers liable for a loss not caused by any mechanical action of the sea, but by the chemical action of the sea water, owing to the copper wire being insufficiently protected, but does cover a loss of a portion thereof by a peril of the sea during an attempt to lay it. This in the former case may be ascribed to natural causes consequent upon inherent defects.[450] In another case, where the policy covered, "in addition to all perils and casualties specified," "every risk and contingency attending the conveyance and successful laying of the cable," it was held that it was the adventure, the successful laying of the cable, that was insured, and not merely the cable itself, and that insurers were responsible for the breaking of the cable during an attempt to remedy defective portions.[451]

§ **2820. Tenant's Liability to Pay Rent—Release of Insurer.**—If a company insures a tenant against loss from liability to pay rent while the building, owing to fire, remains uninhabitable, a re-entry of the landlord to rebuild after a fire, under an agreement that the tenant shall continue to pay rent, releases the insurer, for the right to collect rent ceases upon re-entry, and the company is not holden by any agreement to the contrary.[452]

[449] Carr v. Security Ins. Co., 109 N. Y. 504; 17 N. E. Rep. 369, per Andrews, J.

[450] Patterson v. Harris, 1 Best & S. 336; 30 L. R. Q. J. 354; 2 Best & S. 814.

[451] Wilson v. Jones, 1 L. R. Ex. 192; 36 L. J. Ex. 78; 4 Hurl. & C. 221.

[452] Royal Ins. Co. v. Heller, 133 Pa. St. 152; 19 Atl. Rep. 349; 47 Phila. Leg. Intel. 202; 7 L. R. Annot. 411.

§ **2821. Theft—Fire Risk.**[453]—If the insured, owing to imminent danger to the goods from fire, is justified in their removal, and uses the caution which a prudent uninsured man would reasonably be expected to use under the circumstances, or if he uses his utmost exertions to protect and secure the property at, during, and after the fire, or if in compliance with the stipulations of the policy he labors for the protection and safety of the goods, loss by theft or larceny of the goods falls upon the insurers, even though the goods are stolen after the fire is extinguished, such theft being directly occasioned by the fire; the precise time when the theft occurred is not material.[454] So insurers are liable for stolen goods while being removed at the instance of the company's agent to avoid impending loss by fire.[455] But the company is not liable for property stolen during its removal from a burning building merely because the fire warden advised its removal.[456]

§ **2822. Title Insurance — Mortgagee — Defects in Mortgagor's Title.**—Where a title insurance company covenanted to indemnify, keep harmless, and insure for a specified period the mortgagee from all loss or damage, not exceeding a certain sum, by reason of defects in the mortgagor's title in the real estate or interest mortgaged, or by reason of liens or encumbrances, and agreeing in case of suit to defend upon notice for and in the mortgagor's name, or pay the claim on which the suit was brought, or pay the insured the amount of liability stipulated, and the insurer undertakes to defend, he must protect the insured through all stages of the actions or proceedings, even after foreclosure sale, or else by timely notice place him in a position to protect himself, and provide

[453] See sec. 2804, herein.

[454] Newmark v. Liverpool etc. Ins. Co., 30 Mo. 160; 77 Am. Dec. 608; Witherell v. Maine Ins. Co., 49 Me. 200; Thompson v. Montreal Ins. Co., 6 U. C. Q. B. 319; Leiber v. Liverpool etc. Ins. Co., 6 Bush (Ky.), 639; 99 Am. Dec. 695; Talaman v. Home etc. Ins. Co., 16 La. Ann. 426; Independent Mut. Ins. Co. v. Agnew, 34 Pa. St. 96; 75 Am. Dec. 638. See, also, Tilton v. Hamilton Ins. Co., 1 Bosw. (N. Y.) 367; Whithurst v. Fayetteville etc. Ins. Co., 6 Jones L. (N. C.) 352.

[455] Leiber v. Liverpool etc. Ins. Co., 6 Bush (Ky.), 639.

[456] Fernandez v. Merchants' Ins. Co., 17 La. Ann. 131.

him with the requisite information to enable him so to do, and if after notice the insurer defends, this operates as a withdrawal of notice.[457]

§ 2823. **Warehouseman—Storage of Goods in which Assured has no Interest—Limited Liability.**—If the policy provides that goods in storage must be specifically and separately insured, and limits the liability of insurer to a loss affecting assured's interest, an assured warehouseman cannot sustain an action for the benefit of merchandise on storage in which assured has no interest, and which the depositors thereof have specifically and separately assured as their own, for the insurers are not liable to the warehouseman therefor, and there can be no contribution, there being no double insurance.[458] A warehouseman will be liable to a carrier on goods to the extent that it has neglected to effect insurance thereon, where it agrees to receive said goods and to insure the same for the carrier's benefit.[459] A defect in the warehouse where goods are stored will not render the warehouseman liable for a loss of the goods by fire which is not shown to have resulted from or been in any way connected with the exposure of the goods from such defect.[460] If it is the custom of a warehouse company to insure oil at its own expense, and the purpose of its organization is to transport, store, and insure petroleum, it may effect policies on said property and recover for a loss thereon, even though it is not an owner of the oil insured, there being no representation as to ownership made or required, and the insurers in such case are bound with a knowledge of assured's business and its nature.[461]

§ 2824. **Water Used to Extinguish Fire and Save Property.**—The damage for which fire companies are liable

[457] Quigley v. St. Paul Title Ins. etc. Co., 60 Minn. 275; 62 N. W. Rep. 287; affirmed, (1896) 66 N. W. Rep. 364.

[458] Home Ins. Co. v. Gwathmey, 82 Va. 923; 1 S. E. Rep. 209.

[459] Deming v. Merchants' Cotton Press etc. Co., 90 Tenn. 306; 17 S. Rep. 89; 13 L. R. Annot. 518.

[460] Lancaster Mills v. Cotton Press etc. Co., 89 Tenn. 1; 14 S. W. Rep. 317.

[461] Western & Atlantic Pipe Lines v. Home Ins. Co., 145 Pa. St. 346; 21 Ins. L. J. 24; 22 Atl. Rep. 665.

is not confined to loss by actual burning and consuming, but they are liable for all losses which are the immediate consequences of fire or burning, or of all losses of which fire is the proximate cause.[462] So where water is used to extinguish fire and save property, the insurers are liable for the damage and loss sustained; as in case where goods, which would have burned otherwise, were damaged by water used to extinguish a fire in the building in which the goods were contained, the insurers were held liable.[463] Cases of this character are analogous to those where a building is destroyed by explosion or otherwise to arrest the progress of a conflagration,[464] as well as to cases of removal of goods in imminent danger of destruction from fire.[465]

§ **2825. Wind—Tornado—Hurricane.**—Insurance may be effected against the effect of wind and tornado.[466] If a building is weakened by the effect of fire, and the walls fall by reason of a gale of wind seven days after the fire, the insurers are not liable.[467] A high wind may be a "hurricane."[468] A severe storm may be shown to be a "tornado" by proof of its effects upon property in the vicinity,[469] and a loss by tornado

[462] Babcock v. Montgomery Ins. Co., 6 Barb. (N. Y.) 637, per Pratt, J.; Whitecross Wire & Iron Co. v. Savill, L. R. 8 Q. B. D. 653; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; Case v. Hartford F. Ins. Co., 13 Ill. 680, per Turnbull, J.; Brady v. Northwestern Ins. Co., 11 Mich. 425; Hillier v. Alleghany Mut. Ins. Co., 3 Pa. St. 470. See next chapter herein, on proximate and remote cause.

[463] Geisek v. Crescent Mut. Ins. Co., 19 La. Ann. 297; Thompson v. Montreal Ins. Co., 6 U. C. Q. B. 319; Whitehurst v. Fayetteville etc. Ins. Co., 6 Jones L. (N. C.) 352; New York Ex. Co. v. Traders' Ins. Co., 132 Mass. 381; White v. Republic F. Ins. Co., 57 Me. 91; 2 Am. Rep. 22, per Dickenson, J.; Independent Ins. Co. v. Agnew, 34 Pa. St. 96; Witherell v. Maine Ins. Co., 49 Me. 200.

[464] City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, per Bronson, J.

[465] White v. Republic Ins. Co., 57 Me. 91; 2 Am. Rep. 22, per Dickenson, J.

[466] Sexton v. Hawkeye Ins. Co., 69 Iowa, 99; Poggensea v. Mutual F. L. etc. Ins. Co., 69 Iowa, 157.

[467] Gaskarth v. Law Union Ins. Co., 6 Ins. L. J. 159 (Eng.).

[468] Pelican Ins. Co. v. Troy Co-operative Assn., 13 S. W. Rep. 980.

[469] Poggensea v. Mutual F. L. etc. Ins. Co., 69 Iowa, 157.

may be covered by an insurance against lightning where there are electrical disturbances in the tornado presenting the usual characteristics of lightning.[470]

[470] Spensley v. Lancashire Ins. Co., 54 Wis. 433 (two judges dissenting).

CHAPTER LIX.

PROXIMATE AND REMOTE CAUSE—NEGLIGENCE, ETC.

§ 2832. Proximate and remote cause of loss—Generally.
§ 2833. Same subject: Cases.
§ 2834. Same subject: Rules.
§ 2835. Same subject: Consequential losses.
§ 2836. Same subject: Pro rata freight: Increase of freight.
§ 2837. Proximate cause: Effect of qualifying or enlarging words.
§ 2838. Negligence: Proximate and remote cause: Marine risks.
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§ 2849. Shipowner's protective associations, indemnity for losses by negligence.
§ 2850. Losses directly caused by negligence of assured or his agents: Marine risks.
§ 2851. Wrongful, fraudulent, or criminal acts of assured: Attempts to defraud: Burning vessel.
§ 2852. Malicious acts of insurers' officers in refusing to insure.

§ 2832. Proximate and Remote Cause of Loss.—Generally.—The question of proximate and remote cause of loss is necessarily considered to a large extent in other parts of this work, especially in the chapters on excepted risks and losses. The maxim, Causa proxima non remota spectatur, is peculiarly applicable to the law governing insurances, affecting not only the question of the loss itself, but also that of insurable interest, in that the latter must be such an interest that the peril may proximately operate upon it to the damage of as-

sured.[1] It may be generally stated that the loss in insurance cases must be proximately caused by a peril insured against, and that the contract does not contemplate an indemnity to the assured where the peril is the remote cause of loss. This general principle or rule cannot be controverted, and has been repeatedly and continuously asserted.[2] There is an exception to or perhaps a qualification of the above rule in cases of fire insurance, as will be noted under the sections on negligence.[3] But beyond this point the difficulty arises in formulating a rule as to what constitutes the proximate and what the remote cause of a loss. The subject has no limit, because of the varying and possible combination of circumstances, and although some precedent is established by analogous cases, yet the courts have frequently departed from even these precedents, and where almost the identically same state of facts is presented eminent jurists, both in England and in this country, have disagreed as to the application of the rule as to proximate and remote cause; as in the case of a collision and damages paid by the negligent ship to the other vessel.[4] Again, where there

[1] See Seagrave v. Union M. Ins. Co., L. R. 1 Com. P. 320, per the court; Ionides v. Universal M. Ins. Co., 32 L. J. Com. P. 170; 14 Com. B., N. S., 259, per Erle, C. J.

[2] Caballerio v. Home Mut. Ins. Co., 15 La. Ann. 217; Taylor v. Dunbar, L. R. Com. P. 206; Livie v. Janson, 12 East, 653; Insurance Co. v. Boone, 95 U. S. 11; McCargo v. New Orleans etc. Co., 10 Rob. (La.) 202; 43 Am. Dec. 180; Dent v. Smith, L. R. 4 Q. B. 414; Hillier v. Alleghany etc. Ins. Co., 3 Pa. St. 470; 45 Am. Dec. 566; Patrick v. Commercial Ins. Co., 11 Johns. (N. Y.) 14; Gates v. Madison Co. etc. Ins. Co., 5 N. Y. (1 Seld.) 469; 55 Am. Dec. 360; Case v. Hartford Ins. Co., 13 Ill. 676; Smith v. Accident Ins. Co., L. R. 5 Ex. 302; Wilson v. Newport Dock Co., 4 Hurl. & C. 235, per Pollock, C. B.; Fitton v. Death Ins. Co., 17 Com. B., N. S., 122; Loyd v. General Iron S. C. Co., 3 Hurl. & C. 284; Smith v. Universal Ins. Co., 6 Wheat. (U. S.) 185; Freeman v. Mercantile Mut. Acc. Assn., 156 Mass. 351; 30 N. E. Rep. 1013; Lynn Gas & E. Co. v. Meriden F. Ins. Co., 158 Mass. 570; 33 N. E. Rep. 690; Austin v. Drew, 6 Taunt. 436; 4 Camp. 126, 360; Babcock v. Montgomery Co. Ins. Co., 6 Barb. (N. Y.) 637; City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; Bull v. Carstairs, 14 East, 374; Thompson v. Hopper, El. B. & E. 1038; 27 L. J. Q. B. 441; 6 El. & B. 172, 937; 25 L. J. Q. B. 240; 26 L. J. Q. B. 18.

[3] Lynn Gas & E. Co. v. Meriden Fire Ins. Co., 158 Mass. 570; 33 N. E. Rep. 690, per Knowlton, J.

[4] See sec. 2753, herein.

are several agencies and conditions which have a share in producing and causing the loss, the difficulty of applying any given rule becomes greater. So the peril insured against may be the agency causing the loss, even though that peril may have been set in operation by some other cause, or the peril insured against may set in operation other causes to which the injury itself may be directly due. These and other instances will be illustrated by the opinions of the courts and cases noted hereafter. We believe the cases warrant the following classification. The general rule: The case where the peril insured against is the only cause operating directly; that where the peril sets other causes in motion but there is an unbroken chain of events; that where the peril sets other causes in motion but a distinct cause intervenes; where there are several causes and the question is which is the nearest cause; where there are several causes or agencies and the question is which is the efficient cause; where the peril is set in motion by other causes; where the peril is permitted to operate by negligent or wrongful acts of assured or his agent, or by the barratrous acts of the master or crew in marine risks; or where the peril is permitted to operate by an irresistible extrinsic force over which assured has no control, and whereby he is deprived of that protection which he would otherwise have; or where the loss is consequential and following from necessity directly and immediately upon a peril insured against.[5]

[5] *Opinions on the Above Subject.*—"It were infinite," says Lord Bacon "for the law to consider the cause of causes and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts with that without looking to any further degree": Bacon's Maxims, reg. 1, cited in Lawrence v. Accidental Ins. Co., L. R. 7 Q. B. 216, per Watkin, J. "In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril": Ionides v. Universal M. Ins. Co., L. J. Com. P. 170; 14 Com. B., N. S., 259, per Earle, C. J. It is also said that the peril insured against must be the sole proximate cause of the loss, so causing and so connected with it that it could not otherwise have been produced: Dyer v. Piscataqua etc. Ins. Co., 53 Md. 118; Mathews v. Howard Ins. Co., 11 N. Y. (1 Kern.) 9. "Whether the cause is proximate or remote does not depend alone upon its closeness in the order of time in which certain things occur. An efficient ade-

§ 2833. Same Subject—Cases.—If a ship insured against sea risks while in port is there driven ashore and stranded and burns, this is a loss of the vessel by sea risk, but

quate cause being found, it must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result": United States Mut. Acc. Assn. v. Barry, 131 U. S. 100, 111, 113. The last is not necessarily the proximate cause: McCargo v. New Orleans etc. Ins. Co., 10 Rob. (La.) 202; 43 Am. Dec. 180. "If the peril of the sea which operated in a given case was not of itself sufficient to occasion, and did not in and by itself occasion, the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause to ascertain the efficient cause of the loss": General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 366, per Curtis, J. "It has often been necessary to determine . . . . what is to be deemed the responsible cause which furnishes the foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessary to be chosen. The active, efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source, is the direct and proximate cause referred to in the cases": Lynn Gas & E. Co. v. Meriden F. Ins. Co., 158 Mass. 570; 33 N. E. Rep. 690, per Knowlton, J. "If a vessel is insured against fire only, and is burned to the water's edge, and then fills with water and sinks, it would be difficult, in common sense, to attribute the loss to any other proximate cause than the fire, and yet the water was the principal cause of the submersion. If the vessel be insured against barratry of the master and the crew, and they fraudulently bore holes in the bottom, and thereby she sinks, in one sense she sinks from the flowing in of the water, but in a just sense the proximate cause is the barratrous boring of the holes in her bottom": Potter v. Ocean Ins. Co., 3 Sum. (C. C.) 27, per Story, J. The maxim, causa proxima non remota spectatur, " does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go further back in the line of causation than to find the active, efficient, procuring cause of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient, predominant cause which, following it no further than those consequences that might have been anticipated as not unlikely to result from it, has produced

as to the cargo destroyed in the same ship by the burning and not injured by the stranding the fire is the direct cause of loss. This last as to the cargo is, however, of doubtful authority.[6] Where a stranded vessel is voluntarily scuttled to save her from a storm which began several hours after she stranded,

the effect": Freeman v. Mercantile Mut. Acc. Assn., 156 Mass. 351; 30 N. E. Rep. 1031; Lynn Gas & E. Co. v. Meriden F. Ins. Co., 158 Mass. 570; 33 N. E. Rep. 690, per Knowlton, J.; Insurance Co. v. Boone, 95 U. S. 11. "It is found that the water would not have caused the vessel to sink below her promenade deck; had not some other cause of sinking supervened, it would have expended its force at that point. The effects of the fire were necessary to give it additional efficiency. The fire was, therefore, the efficient, predominating cause, as well as nearest in time to the catastrophe": Howard v. Transportation Co., 12 Wall. (U. S.) 194, per Strong, J. (case of collision, influx of water, breaking out of fire, and sinking of vessel). "The proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, mediate, and predisposing cause. When several causes contribute to death as a result, it may be extremely difficult to determine which was the remote and which was the immediate cause; yet this difficulty does not change the fact that the death is to be attributed to the proximate and not the mediate cause": Miller v. Mutual B. Ins. Co., 31 Iowa, 235. "The primary cause may be the proximate cause of the disaster, though it may operate through successive instruments; as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement. . . . . The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" Milwaukee etc. R. R. Co. v. Kellogg, 94 U. S. 415, per Strong, J.; Lynn Gas & E. Co. v. Meriden F. Ins. Co., 158 Mass. 570; 33 N. E. Rep. 690, per Knowlton, J.; and Atkinson v. Goodrich Transp. Co., 60 Wis. 141; United States Mut. Acc. Assn. v. Barry, 131 U. S. 111, 113, per the court; McCarthy v. Travelers' Ins. Co., 8 Biss. (C. C.) 367, per the court. "When the thing insured becomes by law directly chargeable with an expense or contribution or loss in consequence of a particular peril, the law treats such peril for all practical purposes as the proximate cause of such expense, contribution, or loss": Peters v. Warren Ins. Co., 3 Sum. (C. C.) 389, per Story, J.; Hale v. Washington Ins. Co., 2 Story (C. C.), 176. But see De Vaux v. Salvador, 4 Ad. & E., per Lord Denman.

[6] Patrick v. Commercial Ins. Co., 11 Johns. (N. Y.) 9, 14. See Brown v. St. Nicholas Ins. Co., 61 N. Y. 332, per Dwight, C.

the proximate cause of a loss arising from such scuttling is the storm, and not the stranding.[7] If a joist breaks by reason of a defect therein, and assured, by reason thereof, falls from a barn which is building and is killed, the accident is the proximate cause of death.[8] And where by a collision between steamboats a fire was caused on one of them, and it sank with insured goods on board before the goods were touched by the fire, it was held that if the injury to the goods could have been prevented but for the fire, an action on the insurance policy was maintainable.[9] So if a ship insured against damage from collision but not against perils of the sea runs against a snag in the river, whereby she springs a leak, but she anchors and temporarily repairs the leak, and while she is being towed to port for repairs the leak is opened by the motion of the water, and beginning to sink is run aground and abandoned, the collision is the proximate cause of the loss, and insurers are liable.[10] Where a canal-boat was insured, with the privilege of carrying lime in barrels, against fire and other perils, and it appeared that due care was taken in loading the lime in a safe condition and in protecting it thereafter; that while in tow the boat was discovered to be on fire, and it was attempted to unload the same, but the deck was so hot that it could not be continued, and the boat was scuttled, and it further appeared that the boat was seaworthy; that smoke was seen issuing from the hold; that several pieces of heads of barrels were burned into charcoal, and that pitch oozed from the seams of the boat, owing to intense heat on deck, it was held that fire was the proximate cause of the loss.[11] A collision without fault is the proximate cause of the loss.[12] The explosion of gas and not the lighting of a match is the proxi-

[7] Northwest Transp. Co. v. Boston M. Ins. Co., 41 Fed. Rep. 793.

[8] Stone v. United States Casualty Co., 34 N. J. 371.

[9] New York & Boston D. Exp. Co. v. Traders & Mechanics' Ins. Co., 132 Mass. 377; 42 Am. Rep. 440.

[10] Reischer v. Borwick (1894), 2 L. R. Q. B. D. 548.

[11] Singleton v. Phœnix Ins. Co. (N. Y. C. A. 1892), 21 Ins. L. J. 479; 44 N. Y. St. Rep. 414; 30 N. E. Rep. 839; 32 N. Y. St. Rep. 594.

[12] Peters v. Warren Ins. Co., 14 Pet. (U. S.) 99.

mate cause of loss, where the explosion is caused by the lighting of a match in a room filled with gas.[13] Where gunpowder was ignited by a burning match fire was said to be the agent throughout and the proximate cause of the loss.[14] Where a policy is issued upon goods contained in a building, and purports to insure against all loss or damage by fire, the insurers will be liable for any loss occasioned by a fire in the chimney caused by soot therein accidentally igniting, or for any loss and damage caused by smoke issuing from such fire.[15] If a collision causes a leak which is temporarily repaired, but reopens by reason of the motion of the water in turning her to the nearest dock for repairs, and being in danger of sinking is run aground, the collision is the proximate cause of loss.[16] If a building remains intact as a building, except that a part of the roof is blown away and a small part of the wall is blown down, and by reason thereof and the fact that some upper rooms are left uncovered fire is communicated by the action of the wind to the furniture, which ignites, and the roof and part of the building falling in upon it the building is consumed, the proximate cause of the loss is the fire and not the falling in of the building.[17] If an accidental shot wound causes tetanus, great pain, and delirium, and such intense agony that assured is unable to resist, and is thereby impelled to commit suicide, or if in a state of uncontrollable frenzy caused by the lockjaw resulting from such shot wound he commits suicide, the shot wound is the proximate cause of death.[18] If hernia

[13] Heuer v. Northwestern Nat. Ins. Co., 144 Ill. 393; 33 N. E. Rep. 411; 36 Cent. L. J. 497, and note; Heuer v. Westchester F. Ins. Co., 44 Ill. App. 429; 37 N. E. Rep. 873.

[14] Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, per Cushing, J.

[15] Way v. Abington M. F. Ins. Co. (Mass. 1896), 43 N. E. Rep. 1032.

[16] Reischer v. Borwick (Eng. C. A. 1894), 2 Q. D. L. R. 548.

[17] London & L. Ins. Co. v. Crunk (Tenn. S. C. 1893), 23 S. W. Rep. 140.

[18] Travelers' Ins. Co. v. Melick, 12 U. S. C. C. A. 544; 24 Ins. L. J. 430; 65 Fed. Rep. 178. In this case the condition was: "This insurance does not cover disappearances, nor suicide, sane or insane, ... nor accident, nor death . . . . resulting wholly or partly . . . . from . . . . disease, or bodily infirmity, hernia, fits, ver-

is the result of an accidental injury, and the assured as a last resort to save life submits to a surgical operation, and death ensues, the accident, and not the surgical operation, is the proximate cause of death.[19] Although deceased was intemperate at times, yet where he broke his leg, and it turned black and discoloration extended to the body, causing great pain, the injury was held the proximate cause of death.[20] The fact that the loss is remotely ascribable to a barratrous act as the primary or co-operative cause does not prevent recovery where the proximate cause is a peril of the sea.[21] A gale which forces a boat in tow away from the tug is the proximate cause of the loss, although thereafter she went ashore, sprang a leak, was frozen in, broke away from the ice, drifted several miles, and, coming back with the return tide, broke in two and sank.[22] A peril insured against may be the proximate cause of the loss, although set in motion by irresistible force; as where seamen are sent on shore to cast off a rope by which the vessel is made fast, and they are impressed and carried away, and the vessel in consequence of the rope not being cast off is driven on shore and lost, the loss is by a peril of the sea.[23] It is held, although it is doubtful law, that if a ship is driven on shore by stress of weather and there captured, the proximate cause of the loss is the capture.[24] A seizure in a port of necessity is the proximate cause of the loss, and not the sea peril forcing the ship into such port.[25] Where a ship was captured

tigo, sleepwalking, ... intentional injuries (inflicted by the insured or any other person)": See opinion of the court, Sanborn, Cir. J.

[19] Travelers' Ins. Co. v Murray, 16 Colo. 296.

[20] Prader v. National Mas. Acc. Assn. (Iowa, 1895), 63 N. W. Rep. 601.

[21] Everth v. Harrnam, 2 Marsh, 74; 6 Taunt. 375, per Gibbs, C. J.; Heyman v. Parish, 2 Camp. 149, per Lord Ellenborough; Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 220; Blyth v. Shepherd, 9 Mees. & W. 763.

[22] Brown v. St. Nicholas Ins. Co., 2 Jones & S. 231; affirmed, 61 N. Y. 332.

[23] Hodgson v. Malcolm, 2 N. R. 336, reported in 2 Marshall on Insurance, ed. 1810, 490 a.

[24] Green v. Elmslie, Peake N. P. 212, per Lord Kenyon. See Brown v. St. Nicholas Ins. Co., 61 N. Y. 332, per Dwight, C.

[25] Rice v. Horner, 12 Mass. 230.

and burned by the commander of a privateer acting under authority of the confederate states, the loss was held attributable to the capture and not to the burning.[26] Where a fall produces a contusion of the cerebellum, which culminates in an effusion of blood on the brain, producing apoplexy and death, the fall is the sole proximate cause of the death.[27] Where a fall from a veranda, although producing apparently a slight wound, results nevertheless in erysipelas and death in about twenty-three days after the injury, the fall is the proximate cause of death.[28] And where the policy provided that the policy should cover the case where the "bodily injuries alone shall have occasioned death, ... and provided that the insurance should not extend to hernia, etc., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the contract, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death," and the insured fell from a veranda and sustained a wound in the leg, which became complicated by erysipelas within four or five days, causing death within the time limited by the policy, it was held that the external injury was the proximate or sole cause of death, and that there should be a recovery.[29] Drowning is the sole and proximate cause of death, without regard to the cause of falling into the water, unless death would have resulted without the effect of the water.[30] If a fall causes peritonitis and death follows, the fall is the proximate cause of death, even though assured had previously had peritonitis and is therefore peculiarly subject to its re-

[26] Dole v. New England etc. Ins. Co., 2 Cliff. (C. C.) 394.

[27] Hall v. American Mas. Acc. Assn., 86 Wis. 518; 57 N. W. Rep. 366. See National B. Assn. v. Gramman, 117 Ind. 288.

[28] Accident Ins. Co. of North America v. Young, 12 Can. L. T. 217.

[29] Accident Ins. Co. of North America v. Young (Mont. L. Rep.), 20 S. C. R. (Can.) 280; 28 Can. L. J. N. S., 246.

[30] Manufacturers' Acc. Indem. Co. v. Dorgan (1894), 58 Fed. Rep. 945.

currence.[31] Where assured has delirium tremens and by his own acts exposes himself without clothing, by running into the streets, contracts a cold, and death ensues, the intemperance is held the proximate cause of death.[32] Again, where assured, under an accident policy, received a wound which was lanced and discharged and continued to discharge matter, which communicated to a second wound, causing blood poisoning, it was held that if the inoculation occurred when the wound was made and was a part of the accident the accident was the sole and proximate cause of death.[33] If a person falls in a fit upon the railroad track and is killed by a locomotive engine, the death is due to the engine as the immediate and proximate cause, and the law will not consider the cause of the cause.[34] Where deceased had a fall, of the effects of which he complained several days and bore the bruise, fell sick, and died, the jury has a right to believe, where the evidence is conflicting as to the direct cause of death, that the wound produced the death.[35] In another case the policy stipulated against liability for loss or damage that might occur by reason of high water, floods, or freshets, said insurance being only against "cyclones, windstorms, and tornadoes," and a bridge was insured, and it appeared that a storm of great violence arose, the wind attaining a velocity of one hundred and twenty miles an hour, banking up the water and causing a rise in the tide of four and one-half feet above the normal height. Two schooners, to which were attached a loaded barge and elevator, were forced by the storm from their moorings and driven through the bridge, knocking down a span thereof. Several heavy lighters were also forced against the bridge, and the damage caused to the bridge amounted to

[31] Freeman v. Mercantile Mut. Acc. Assn. (Mass. S. J. C. 1892), 30 N. E. Rep. 1013.

[32] Miller v. Mutual B. Ins. Co., 34 Iowa, 222.

[33] Martin v. Equitable Acc. Assn. (N. Y. S. C. 1891), 41 N. Y. St. Rep. 77; 16 N. Y. Supp. 279.

[34] Lawrence v. Accidental Ins. Co., L. R. 7 Q. B. D. 216; Winspear v. Accident Ins. Co., 6 Q. B. D. 42.

[35] Standard Life etc. Ins. Co. v. Thomas (Ky. 1891), 17 S. W. Rep. 275.

about thirty-five thousand dollars. Upon the trial of the case brought upon the policy the following instruction was held correct: "The question is one of fact for the jury, Was the injury to the bridge caused by freshet, flood, or high water, or was it caused by cyclone, windstorm, or tornado? That is to say, What was the real cause of the injury, the dominant, originating cause of the injury—that cause but for which the injury would not have happened? If this cause, the operating, originating, efficient cause, was high water, flood, or freshet, the policy does not cover the loss, and the plaintiff cannot recover; but if this operating, originating, dominant, and efficient cause was a cyclone, tornado, or windstorm, then the policy does cover this loss, and you must find for the plaintiff"; and the court, per Morris, D. J., says: "The rule of law is well settled that where a particular peril is insured against, in order to be entitled to indemnity the assured must show that the particular peril caused the loss. It is held that the peril which causes the loss is the one which is the predominating and efficient cause, the cause which produces the disaster without any new intervening cause, which of itself would have been sufficient to produce the result." [86]

§ **2834. Same Subject—Rules.**—As far as it is possible to formulate any general rules the following seem to be in accord with the authorities, and are sufficiently illustrated by the opinions and cases cited under this chapter, as well as by others throughout this treatise, especially those chapters covering excepted risks and losses and risks and losses. The peril insured against contemplates such losses as are proximately caused by it, and not such as are remote, except (a) so far as fire risks cover the negligent acts of assured or his agent; except (b) such losses as are consequential, following directly and immediately from the peril or necessarily from incidental and surrounding circumstances, operating upon, in

[86] Phenix Ins. Co. v. Charleston Bridge Co., 13 U. S. C. C. A. 58; 65 Fed. Rep. 628; citing Insurance Co. v. Tweed, 7 Wall. (U. S.) 44; Insurance Co. v. Boon, 95 U. S. 131; Railway Co. v. Kellogg, 94 U. S. 469-73.

conjunction with, or springing from the peril, the operation and influence of which could not be avoided; except (c) such losses which although caused proximately by a peril insured against, yet such peril is directly caused by the fraudulent or wrongful act of assured. If the efficient and only cause of the loss is clearly a peril insured against, it is unnecessary to seek further for the cause of that cause, except in cases of fraudulent or wrongful acts of assured. If the loss proceeds inevitably and of absolute necessity from a specified cause, that will be the proximate cause, and where a certain result usually and naturally follows from a certain cause, the one may be deemed to sustain an immediate relation to the other; but neither of these propositions constitutes the sole test whereby the proximate cause of the loss may be ascertained. If there are different agencies, each of which conduces to the loss, the moving efficient cause nearest in point of time may be considered; but if one cause be merely the nearest and another the adequate efficient cause, the efficient cause is the proximate one, for closeness in the order of time in which certain things occur is not necessarily the test. If an efficient adequate cause be found, it is to be considered, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result. The peril insured against may be the primary cause operating through an unbroken successive chain of events which form a continuous whole, in which case said peril is considered the proximate cause, but if the loss may be attributed to a new and controlling influence, an independent event intervening whereby the chain of successive events is broken, then the peril which set in motion the successive causes may become too remote to be considered. If the peril would not of itself have caused the loss except it had been superinduced by some merely negligent act of the assured or his agent, nevertheless the peril may be the proximate cause of the loss. If a peril be insured against and there be an excepted peril which conduces to the operation of the peril insured against or which operates in conjunction with said peril to produce the loss, the predominating efficient cause of the loss must be considered, provided the two

causes can be so far separated that one can be clearly seen to be the moving efficient cause rather than the other. A peril nevertheless may be the proximate cause of loss even though it is indirectly or incidentally brought into operation or enhanced by a cause not expressly and impliedly within the terms of the policy. A peril which is the proximate cause of loss may nevertheless not be at the risk of insurer because of an express stipulation to that effect. A peril which is at the risk of assured upon one subject may nevertheless be the cause of the operation of another peril, whereby the latter may become the proximate cause of loss upon another subject at the risk of insurer in the same policy. If the efficient proximate cause of the loss is a separate and distinct peril which is expressly or impliedly at the risk of assured, the mere fact that such peril is set in motion or indirectly or incidentally aggravated by a peril insured against does not place the loss upon insurer. If the efficient proximate cause of the loss is clearly an excepted peril, and the peril insured against is merely an incident thereof, the assured is not aided. In the case of the operation of separate perils at the risk of separate parties insurers, or of insured and insurer, the damage by the separate perils being indistinguishable, the moving, efficient, predominant cause must be considered, whether it be the nearest or the one which set a successive chain of events in motion, and the party sustaining the risk of such efficient predominant peril must bear the loss. But if the damage by the separate perils can be distinguished, each party must sustain his proportion. The peril which is the efficient cause of loss of the ship may thereby proximately cause the total or partial loss of the profits or freight by preventing, by the damage or destruction of the ship and goods, the possibility of realizing freight or profits.

§ 2835. **Same Subject—Consequential Losses.**—If losses sustained by the particular thing insured are the direct and immediate consequence of the accident or peril insured against, such peril is the proximate cause of the loss; as where the ship springs a leak and sinks in a river, whereby the goods

are spoiled, and this rule has been extended to cover expenses or contribution or other loss, but it must be a proximate effect of the accident or peril.[37] Or where in case of capture if before the vessel is delivered from that peril she is lost by fire or accident or negligence of the captors, or other peril insured against, the whole loss may be ascribed to the capture.[38] So a loss by fire includes every loss necessarily following from the occurrence of a fire if it arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided; that is, consequences naturally flowing from or incident to a peril insured against are attributable thereto;[39] and, as already noted, it is held that if the thing insured becomes by law directly chargeable with any expense, contribution, or loss in consequence of a particular peril, that peril is the proximate cause of such expense.[40] Expenses incurred by the detention of goods is not at the charge of the underwriter on the ship.[41] But the expenses of getting the ship afloat necessitated by the damage occasioned by a peril insured against in marine risks is the underwriter's loss, such repairs being necessary for the safety of the ship for the voyage, and not being attributable to mere wear and tear.[42] So the underwriters are bound to pay a partial loss and their share of the extra expense of obtaining money on bottomry.[43] If a sale of

[37] 2 Marshall on Insurance, ed. 1810, *720, *721, reported Carey v. King, Hardr. 304. See, also, Peters v. Warren Ins. Co., 3 Sum. (C. C.) 389, per Story, J.

[38] Magoun v. New England M. Ins. Co., 1 Story (C. C.), 157.

[39] Brady v. Northwestern Ins. Co., 11 Mich. 425; McCargo v. New Orleans etc. Ins. Co., 10 Rob. (La.) 202; 43 Am. Dec. 180.

[40] Peters v. Warren Ins. Co., 14 Pet. (U. S.) 90; Hale v. Washington Ins. Co., 2 Story (C. C.), 176; Magoun v. New England Ins. Co., 1 Story (C. C.), 157.

[41] Bradford v. Levy, Ry. & M. 331.

[42] Hastie v. De Peyster, 3 Caines (N. Y.), 190; Center v. American Ins. Co., 7 Cow. (N. Y.) 564; Insurance Co. v. Fitzhugh, 4 B. Mon. (Ky.) 160; Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 159; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456; Giles v. Eagle Ins. Co., 2 Met. (Mass.) 140.

[43] Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 406, per Story, J. See Orrok v. Comm. Ins. Co., 21 Pick. (Mass.) 456. But see Greer v. Poole, 5 Q. B. 272; 49 L. J. Q. B. 463.

goods is made to pay for repairs on the ship at a foreign port, this is not at the charge of the underwriter on goods, as on average loss.[44] If a ship be disabled by a storm, and by reason thereof is subsequently lost, the underwriter is liable.[45] But mere straining and deterioration consequent upon stranding, where the damages are uncertain, conjectural, and incapable of specific estimation, and the injury is not capable of repairs, are not the subject of remuneration.[46]

§ 2836. Same Subject—Pro Rata Freight—Increase of Freight.—The owners of the goods cannot charge the underwriters with the amount paid for freight pro rata by the owners of the goods to the owners of the ship, for it may be broadly stated, as a general proposition, that the underwriters upon the cargo have nothing to do with the freight.[47] The

[44] Sarquy v. Hobson, 2 Barn. & C. 7; 4 Bing. 131; 3 Dowl. & R. 192; 1 F. & J. 347; Powell v. Gudgeon, 5 Maule & S. 431; Duncan v. Benson, 1 Exch. 537.

[45] Potter v. Ocean Ins. Co., 3 Sum. (C. C.) 27.

[46] Peele v. Suffolk Ins. Co., 7 Pick. (Mass.) 254; Sage v. Middletown Ins. Co., 1 Conn. 239, per Baldwin, J.; Sewall v. United States Ins. Co., 11 Pick. (Mass.) 92. But see Giles v. Eagle Ins. Co., 2 Met. (Mass.) 140, per Putnam, J.

[47] Barllie v. Nodigham, per Lord Mansfield, reported in 2 Marshall on Insurance, ed. 1810, 728a, cited in 2 Arnould on Marine Insurance, Perkins' ed. 1850, 188, 189, 791, 958, 1183; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 743, 801, 976, 977; 1 Phillips on Insurance, 3d ed., 678, sec. 1138; 2 Parsons on Marine Insurance, ed. 1868, 402; 1 Park on Insurance, 116. See Dodge v. Union Ins. Co., 17 Mass. 471; Blanks v. Hibernia Ins. Co., 36 La. Ann. 599, 604, 605; Caze v. Baltimore Ins. Co., 7 Cranch (U. S.), 362; Maine Ins. Co. v. United Ins. Co., 9 Johns. (N. Y.) 186; Amroyd v. Union Ins. Co., 3 Binn. (Pa.) 437; Roe v. Crescent Ins. Co., 11 La. Ann. 408; Schultz v. Ohio Ins. Co., 1 B. Mon. (Ky.) 339; Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383; Shipton v. Thornton, 9 Ad. & E. 336, 337, per Lord Denman, C. J. See chapter herein on sale, transshipment, repairs, etc. Mr. Arnould distinguishes between pro rata freight paid by the merchant to the shipowner and increased freight, expressing a doubt whether "under certain circumstances" such increased freight may not be at the charge of insurers: 2 Arnould on Marine Insurance, Perkins' ed. 1850, 188, 189, 985, 1183, 791, and note, stating "that the underwriter on goods may be held liable for this increased freight, the following cases go far to establish: Searle v. Scovell, 4 Johns. Ch. (N. Y.) 218; Dodge v. Union M. Ins. Co., 17 Mass. 471; Mumford v. Comm. Ins. Co., 5 Johns. (N. Y.)

authorities herein noted and the cases relied on give weight to the proposition that if the transshipment of the cargo is necessitated by the perils insured against, and there is an increase of freight, in case the substituted freight is in excess of that originally stipulated the insurers on cargo are liable, and this rule is supported by the reasons below stated by Mr. Phillips.

§ 2837. Proximate, etc., Cause—Effect of Qualifying or Enlarging Words.—The rule as to proximate and remote cause may be changed by the insertion in the policy of qualifying or enlarging words. Thus, although an injury may not be the proximate cause of death, yet death may so far ensue as the natural, reasonable consequences of an injury as to be death "from the effects of such injury," where the chain of circumstances lead naturally from the injury to the death, as where by accident the assured was confined to his bed, and owing to the severe pain he became restless and could not bear heavy or warm clothing, and was reduced to such a debility that pneumonia set in, from which he died.[48] So the words "consequences resulting therefrom," used in an insurance against losses from the "derangement or breaking of the engine or machinery," mean an immediate or proximate, but not a remote, consequence.[49] And in an accident risk against loss of time from bodily injuries which "independently of all other causes immediately, wholly, and continuously" disable

262. See Abbott on Shipping, 6th ed., 365, in note to 3 Kent's Commentaries, 5th ed., 338; Shultz v. Insurance Co., 1 B. Mon. (Ky.) 336." Mr. Maclachlan makes the same distinction, but he says: "It seems scarcely doubtful that he is liable for the increased freight": 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 743, 801, 976, 977; citing Shipton v. Thornton, 9 Ad. & E. 336, 337; Matthews v. Gibbs, 30 L. J. Q. B. 55; Roselto v. Gurney, 11 Com. B. 176, 188; Barllie v. Nodigham, 1 Park on Insurance, 116. Under Mr. Phillips' rule the insurer is liable as to such increased freight, on the ground that the payment of such excess prevents a total loss of the cargo by loss of the voyage, and therefore an expense necessarily or properly incurred to avoid or diminish the peril: 1 Phillips on Insurance, 3d ed., 678, sec. 1138; relying upon Mumford v. Comm. Ins. Co., 5 Johns. (N. Y.) 262; Dodge v. Union Ins. Co., 17 Mass. 476, per Wilde, J.

[48] Isitt v. Railway Pass. Assur. Co., L. R. 22 Q. B. D. 504.

[49] Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; 8 Supr. Ct. Rep. 68.

assured, etc., the words, "independently of all other causes" preceding the word "immediately" make the latter a word of time, and not of cause and effect, and in this respect is distinguished from the words "reasonable time," if these words had been used.[50] And again, where the words "independently of all other causes immediately and wholly disable" were used in an accident policy insuring against loss of time resulting from bodily injury through external, violent, and accidental means, it is held that the word "immediately" does not mean "proximately" in the sense of causation, but expresses proximity of time with the injury, and is used in the sense of "presently, without lapse of time or material delay." [51] So the word "secondary" in a policy may, it is held, qualify the rule as to proximate cause in accident risks excepting "disease or secondary cause or causes arising under the system." [52] In another case a steamboat on which were goods insured against "immediate loss by fire" came into collision with another steamboat. A fire caused thereby at once broke out, and the vessel subsequently sank with the goods before they were touched by the fire, and it was held that if the damage to the goods could have been avoided but for the intervention of the fire, that was the immediate cause of the loss, and the suit was maintainable on the policy.[53] So it has been held that "direct loss or damage" by fire means "immediate" or "proximate" as distinguished from "remote." [54]

§ **2838. Negligence—Proximate and Remote Cause—Marine Risks.**—The object of insurance is to grant indemnity against certain perils which the assurer assumes. The proximate cause of loss is alone to be considered, and not the remote cause. So that it is now well-settled law in marine insurances that where the policy does not provide otherwise, if

[50] Williams v. Preferred Mut. Acc. Assn. (Ga. 1893), 23 Ins. L. J. 75; 17 S. E. Rep. 982.

[51] Merrill v. Travelers' Ins. Co., 91 Wis. 329, 332, per Pinney, J.

[52] Smith v. Accident Ins. Co., 5 L. R. Ex. 302; 39 L. J. Ex. 211.

[53] New York & Boston Dis. Exp. Co. v. Traders & Mechanics' Ins. Co., 132 Mass. 377; 42 Am. Rep. 440.

[54] Ermentraut v. Girard F. & M. Ins. Co. (Minn. 1895), 65 N. W. Rep. 635.

the proximate cause of the loss is a peril insured against, the fact that the loss is remotely ascribable to the negligence of the master or mariners of the vessel, or of their other officers or employees, or by the want of judgment or skill in the master, a competent master having been provided, there being no fraud or design nor acts amounting to barratry, constitutes no defense to the underwriter, whether the policy does or does not specify the risk of barratry.[55] This rule has, however, never been extended to the case of a voluntary deviation.[56]

[55] Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; 8 Sup. Ct. Rep. 68; Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340; 41 Am. Dec. 592; Sperry v. Delaware Ins. Co., 2 Wash. (C. C.) 243; Georgia Ins. & T. Co. v. Dawson, 2 Gill (Md.), 365; Shore v. Brentall, 7 Barn. & C. 798, n; Busk v. Royal Exch. Assur. Co., 2 Barn. & Ald. 73; Peters v. Phœnix Ins. Co., 3 Serg. & R. (Pa.) 25; American Ins. Co. v. Insley, 7 Pa. St. 223; 47 Am. Dec. 509; Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 224; 1 McLean (C. C.), 275; Champlin v. Railway Assur. Co., 6 Lans. (N. Y.) 71; Smith v. Scott, 4 Taunt. 126; Redman v. Wilson, 14 Mees. & W. 476; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 237; Starbuck v. New England M. Ins. Co., 19 Pick. (Mass.) 198; Williams v. Suffolk Ins. Co., 3 Sum. (C. C.) 270; Earnmoor S. S. Co. v. Union Ins. Co., 44 Fed. Rep. 374; Louisville Underwriters v. Pence (Ky. 1892), 19 S. W. Rep. 10; Shultz v. Pacific Ins. Co., 14 Fla. 73; Phœnix Ins. Co. v. Erie Transportation Co., 117 U. S. 325; Bishop v. Pentland, 7 Barn. & C. 219; 1 Moore & R. 49; New Orleans & N. etc. Co. v. Louisville Underwriters, 45 Fed. Rep. 370; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; Merchants' Ins. Co. v. Butler, 20 Md. 41; Merchants' Mut. Ins. Co. v. Sweet, 6 Wis. 670; National Ins. Co. v. Webster; 83 Ill. 470; Dunham v. New England etc. Ins. Co., 1 Low. (U. S. D. Mass.) 253; Insurance Co. v. Sherwood, 14 How. (U. S.) 351; Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14; German Ins. Co. v. Sherlock, 25 Ohio St. 33; Western Tel. Co. v. Home & Col. Ins. Co., 6 Q. B. D. 61; Carruthers v. Gray, 3 Camp. 142; 15 East, 35; Phœnix etc. Ins. Co. v. Cochran, 51 Pa. St. 143; Dixen v. Sadler, 8 Mees. & W. 895; affirming 5 Mees. & W. 405; Home v. Providence-Washington Ins. Co., 23 S. C. 190; Walker v. Maitland, 5 Barn. & Ald. 171; Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35; 35 Am. Dec. 589; Union Ins. Co. v. Smith, 124 U. S. 105, and cases 427; Perrin v. Protection Ins. Co., 11 Ohio, 147; overruling Lodwicks v. Ohio Ins. Co., 5 Ohio, pt. 1, 276; Fulton v. Lancastine Ins. Co., 7 Ohio, pt. 2, 5; Matthews v. Howard Ins. Co., 11 N. Y. 9; overruling Grim v. Phœnix Ins. Co., 13 Johns. (N. Y.) 451; Cleveland v. Union Ins. Co., 8 Mass. 308; substantially overruled in Nelson v. Suffolk Ins. Co., 8 Cush. (Mass.) 477, 496. And see Citizens' Co. v. Marsh, 41 Pa. St. 386.

[56] *Opinions of Courts upon the Above Subject.*—This rule has been

§ 2839. Same Subject—Cases.—Where the joint of the mud valve of the insured steamer was out of order, and the captain, who knew that repairs were being made, upon

variously expressed; thus, it is held that the insurance is not defeated by the mere fact that the loss might have been avoided by the exercise of proper care on the part of those in charge of the vessel at the time: Enterprise Ins. Co. v. Parisot, 35 Ohio, 35; 35 Am. Rep. 589. It is declared by Gibson, C. J., again: "The court properly said in effect that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy. . . . . 'Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means; for though the maxim respondeat superior is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for the acts of his servants nor for himself' ": Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; 8 Sup. Ct. Rep. 68; citing American Ins. Co. v. Insley, 7 Pa. St. 229; 47 Am. Dec. 409, per Gibson, C. J. Mr. Justice Story says: "If we look to the question upon mere principle, without reference to authority, it is difficult to escape from the conclusion that a loss occasioned by a peril insured against is a loss within a marine policy, unless there be some other language in it which repels that conclusion. . . . . There is nothing unreasonable, unjust, or inconsistent with public policy in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal fraud. . . . . If negligence of the master or crew were . . . . a good defense, it would be perfectly competent to examine on the trial any single transaction of the whole voyage; whether there was due diligence in all respects in twisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage, for all these might be remotely connected with the loss. If there had been more diligence or less diligence, the peril might have been avoided or escaped, or never encountered at all. Under such circumstances the chance of recovery upon a policy for any loss from any peril insured against would itself be a risk of no inconsiderable hazard. . . . . In marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners": Waters v. Merchants' etc. Ins. Co., 11 Pet. (U. S.) 213; 1 McLean (C. C.), 275; affirming as to the latter part of the above quotation the same rule stated in Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 517; and this is further cited with approval in Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; 8 Sup. Ct. Rep. 68, per Harlan, J. Again: "If this doctrine [that insurers are not liable in such cases] were to prevail, it might go still further, and it might be contended that if a master conducts his ship so

his return to the vessel gave his signal to let go without inquiring into the condition of the steam, in consequence of which, and there not being sufficient steam to propel the vessel, she was carried down the river and over the falls and sank, it was held that no fraud or design or willful or reckless act of omission being proven the insurers were liable.[57] So negligence in managing the vessel is no defense, the loss being caused by the explosion of the boilers.[58] So a captain of a vessel is not chargeable with negligence, where upon the seizure of his vessel he was thrown into prison, and on his release immediately claimed her, but was threatened with death if he persisted in so doing.[59] And if a vessel is blown over and bilged through the negligence of the superintendent of a marine railway during an attempt to haul her up to be repaired, the insurer is liable, unless the loss be occasioned by the misrepresentation of the shape of the vessel by the master to the superintendent.[60] So insurers are liable for damage to

unskillfully as to run it upon a rock, that is not a peril of the sea, but the peril of the unskillfulness of the master": Smith v. Scott, 4 Taunt. 126, per Heath, J. It is also held that willful or negligent conduct on the part of the insured by which salvage is lost might discharge the underwriter, as fraud certainly would: Dunham v. New England etc. Ins. Co., 1 Low. (U. S. D. Mass.) 253. So it is declared that negligence not contributing to or causing the loss is no defense to an action (Home v. Providence-Washington Ins. Co. 23 S. C. 190), and ordinary negligence of the ship's master is no defense: Earnmoor S. S. Co. v. Union Ins. Co., 44 Fed. Rep. 374. So in the absence of an express stipulation in the policy the underwriter is liable for losses resulting from negligence not amounting to barratry: Richelieu etc. Nav. Co. v. Boston M. Ins. Co., 26 Fed. Rep. 596; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; Shultz v. Pacific Ins. Co., 14 Fla. 73; Waters v. Merchants' etc. Ins. Co., 11 Pet. (U. S.) 213; 1 McLean (C. C.), 275, per Story, J. And it is also declared that a shipper is not responsible for the negligence and carelessness of a competent master: Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77. But where the master acts directly under the assured, it is held that insurers are not liable for his neglect: Teasdale v. Charleston Ins. Co., 2 Brev. (S. C.) 190; 3 Am. Dec. 705; Perrin v. Protection Ins. Co., 11 Ohio, 147; Himely v. Stewart, 1 Brev. (S. C.) 209.

[57] Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; 8 Sup. Ct. Rep. 68.

[58] Perrin v. Protection Ins. Co., 11 Ohio, 147.

[59] Thompson v. Mississippi Ins. Co., 2 La. 288; 22 Am. Dec. 129.

[60] Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14.

a vessel, though insured, through collision, that being a peril within the policy, although the collision was caused by the negligence of the master and crew of the insured vessel.[61] And where the vessel was frozen in for the winter, the crew being discharged, and the mate who was left in charge of the vessel kindled a fire on board and negligently failed to extinguish it, but went away for the night, and the vessel was destroyed, the insurers were held liable.[62] And if sea damage may be ascribable to different causes with or without negligence on the part of the ship, in determining to which cause the damage may be assigned the nature and extent of the damage may be a material factor.[63] In another case, although a fog prevented a vessel's seeing an island on which she stranded and the peril was caused by negligence or unseaworthiness, such negligence or unseaworthiness was held the proximate cause of the loss.[64] And it is also held that the underwriters are not liable for the loss of a stranded vessel, when the loss could have been avoided by care and diligence on the part of owner or his agent.[65] If the proximate cause of loss to the cargo is a peril insured against, the fact that plaintiff's servants omitted to take such precautions as were necessary to prevent further damages will not prevent a recovery of the necessary damage, in the absence of a stipulation to that effect, although it may be admissible in evidence in reduction of damages.[66]

§ 2840. **Negligence—Proximate and Remote Cause—Fire Risks.**—In fire risks it is one of the objects of insuring to secure indemnity against the consequences of negligence, and, in the absence of a contrary stipulation, if a

[61] Street v. Augusta Ins. & B. Co., 12 Rich. L. (S. C.) 13; 75 Am. Dec. 714.

[62] Busk v. Royal Exch. Assur. Co., 2 Barn. & A. 73.

[63] Matthiessen & Wiechers Sugar Ref. Co. v. Gusi, 29 Fed. Rep. 794.

[64] Richelieu & O. Nav. Co. v. Boston M. Ins. Co., 136 U. S. 408; 10 Sup. Ct. Rep. 934; 34 L. ed. 398.

[65] McDowell v. General M. Ins. Co., 7 La. Ann. 684; 56 Am. Dec. 619.

[66] Savage v. Corn Exch. etc. Co., 4 Bosw. (N. Y.) 1.

loss by fire is occasioned by the mere fault, carelessness, or negligence of assured or his servants or agents, such negligence, carelessness, or want of due care is no defense, unless there is fraud or design or gross negligence or misconduct of such a kind and degree as to clearly evidence a corrupt design or fraudulent purpose on the part of assured, or some one acting with his privity or consent, for the proximate cause of the loss is alone to be considered.[67] And though the carelessness be that of an employee[68] or of a servant or tenant, the insurer is nevertheless liable. The negligence of a tenant is not a defense to an action by the owner and landlord on a policy.[69] So the acts, even though evincing fraud or design, must be connected with the assured. It is not sufficient that they are the willful and fraudulent acts of his servants or agents, if the assured is neither expressly nor impliedly a party thereto, and

[67] D'Antremont v. Fire Assn. of Philadelphia, (N. Y. S. C. 1892), 20 N. Y. Supp. 344; 48 N. Y. St. Rep. 43; 65 Hun (N. Y.), 475; Gove v. Farmers' M. F. Ins. Co., 48 N. H. 41; 97 Am. Dec. 572; 2 Am. Rep. 168; Citizens' Ins. Co. v. Marsh, 1 Pa. St. 386; Phœnix Ins. Co. v. Sullivan (Kan. 1888), 18 Pac. Rep. 528; Schneider v. Providence etc. Ins. Co., 24 Wis. 28; Gates v. Madison Mut. Ins. Co, 1 Seld. (N. Y.) 469; 55 Am. Dec. 360; Midland Ins. Co. v. Smith. 6 Q. B. D. 561, per the court; Mickey v. Burlington Ins. Co., 35 Iowa, 174; 14 Am. Rep. 494; Cumberland etc. Co. v. Douglas, 58 Pa. St. 419; 98 Am. Dec. 298; Dobson v. South. Moody & M. 90; Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 517; Cumberland Valley etc. Co. v. Douglas, 58 Pa. St. 419; Kansas Ins. Co. v. Perry, 8 Kan. 159; Perrin v. Protection Ins. Co., 11 Ohio, 147; 38 Am. Dec. 728; Huckins v. People's Ins. Co., 11 Fost. (31 N. H.) 238; Williams v. New England Mut. F. Ins. Co., 31 Me. 219; Muellens v. Putnam Ins. Co., 45 Mo. 84; Henderson v. Western F. & M. Ins. Co., 10 Rob. (La.) 164; 43 Am. Dec. 176; Harrow v. Continental Ins. Co., 57 Wis. 56; 46 Am. Rep. 17; Johnson v. Berkshire F. & M. Ins. Co., 4 Allen (Mass.), 388; Hynds v. Schenectady Co. Mut. Ins. Co., 16 Barb. (N. Y.) 119; Whitehurst v. Fayetteville etc. Ins. Co., 7 Jones (N. C.) 352; Lycoming Ins. Co. v. Barringer, 73 Ill. 330; Brown v. Kings Co. F. Ins. Co., 31 How. Pr. (N. Y.) 508; Firemen's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; Maryland Ins. Co. v. Whitford, 31 Md. 219; Phœnix Ins. Co. v. Cochran, 51 Pa. St. 143; Young v. Washington Co. Mut. Ins. Co., 14 Barb. (N. Y.) 545; Amona F. Ins. Co. v. Johnson, 46 Ind. 315; Ware v. Barrataria etc. Co., 15 La. (O. S.) 170; Jameson v. Royal Ins. Co., 7 Irish L. 126; Scripture v. Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356; Catlin v. Springfield F. Ins. Co., 1 Sum. (C. C.) 434.

[68] Perrin v. Protection Ins. Co., 11 Ohio, 147; 38 Am. Dec. 728.

[69] Gates v. Madison etc. Co., 5 N. Y. (1 Seld.) 469; 55 Am. Dec. 360.

the acts have been done without his procurement, privity, or assent.[70] So where loss is caused by the mere fault or negligence of a watchman employed by the insured, and without fraud or design on the part of the latter, it is within the protection of the policy; but to entitle insured to recover, it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the policy.[71]

[70] Midland Ins. Co. v. Smith, 6 Q. B. D. 561; Simpson v. Burnill, L. R. 3 App. C. 279; Gove v. Farmers' etc. Ins. Co., 48 N. H. 41; 97 Am. Dec. 572; Davidson v. Case, 8 Price, 542; Gurison v. Woodfall, 2 Car. & P. 41; North of England Ins. Co. v. Armstrong, L. R. 5 Q. B. 244; Crosby v. Long, 12 East, 409; Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35; 35 Am. Rep. 589. See Ewells' Evans on Agency, ed. 1878, 620, *479, et seq.; Cooley on Torts, 2d ed., 627, *535, et seq.

[71] Rankin v. Amazon Ins. Co., 89 Cal. 203; 23 Am. St. Rep. 460. *Opinions of Courts upon the Above Subject.*—It is held that mere negligence of assured which is the direct cause of a loss by fire is not a defense when assured acts in good faith, and his negligence does not amount to recklessness and willful misconduct: Johnson v. Berkshire M. F. Ins. Co., 4 Allen (Mass.), 388. So mere negligence on the part of assured or his servants resulting in the destruction of the insured property will not defeat the policy; to have that effect the negligence must be gross and inexcusable: Mickey v. Burlington Ins. Co., 35 Iowa, 174; 14 Am. Rep. 494. In fire insurance "it is held that the intention of the parties must have been to insure against losses, where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause, which made use of it or set it in motion, if the original efficient cause was not itself made a subject of separate insurance. For instance, where the negligent act of the insured or of anybody else causes a fire and so causes damage, although the negligent act is the direct proximate cause of the damage through the fire, which was the passive agency, the insurer is liable for a loss caused by the fire. This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies, from its application in other actions, ... in principle and by the weight of authority in many well-considered cases. We think it clear that apart from the single exception above stated, the question as to what is a cause which creates a liability is to be determined in the same way on policies of fire insurance as in other actions": Lynn Gas & E. Co. v. Meriden F. Ins. Co., 158 Mass. 570; 33 N. E. Rep. 690, per Knowlton, J. So, again, although a fire may occur from the negligence of the assured, yet if the negligence was not willful, or of such degree as amounts to fraud, the insurer is liable: Phœnix Ins. Co. v. Sullivan (Kan. 1888), 18 Pac. Rep. 528. And in another case it is

§ **2841. Same Subject—Cases.**—The mere carelessness or imprudence of assured in using fire in such a manner that the building caught fire and was destroyed is no defense.[72] So the insurers are liable for an explosion of benzine, caused by a servant approaching closely to the barrel with a lighted lamp while the contents were being emptied through a syphon into a tin can—permission to keep benzine in tin cans being stipulated.[73] And if fire is negligently communicated to gunpowder in the hold of a vessel by the officers or crew, not barratrously done, it is a loss within the policy.[74] So, in an Iowa case, an applicant for a policy of fire insurance covenanted to keep his stoves and pipes well secured. After the policy was issued, the wife of the assured, intending to remove for the summer a stove the pipe of which passed through the floor of an upper room and thence into the chimney, took

held that one of the objects of insurance being recompense for one's negligence in case of a loss, if the negligence of assured is not willful or so gross as to amount to fraud, the insurer will not be released: Lycoming Ins. Co. v. Barringer, 73 Ill. 230. Again, no fraud being shown, the proximate cause of the loss is to be considered, even though occasioned by gross negligence of assured or his servants: Gates v. Madison etc. Ins. Co., 5 N. Y. (1 Seld.) 469. So negligence of assured cannot be made available by insurer as a defense to loss by fire, unless it be of such degree as will evince a corrupt design or fraudulent purpose on his part: Gove v. Farmers' F. M. Ins. Co., 48 N. Y. 41; 97 Am. Dec. 572; Cumberland etc. Co. v. Douglas, 58 Pa. St. 419; 98 Am. Dec. 298. "A loss by fire occasioned by the mere fault or negligence of assured or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss, and also upon the general ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies": Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 517, per the court; quoted in Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; 8 Sup. Ct. Rep. 68, per Harlan, J. Again, it is well settled that "a loss by fire on land occasioned by the mere fault and negligence of the insured party, his servants, or agents, without fraud or design, is a loss protected by the policies": Gove v. Farmers' etc. Ins. Co., 48 N. H. 41; 2 Am. Rep. 168; 97 Am. Dec. 572, per Nesmith, J.

[72] Johnson v. Berkshire Mut. F. Ins. Co., 4 Allen (Mass.), 388.

[73] Maryland Ins. Co. v. Whitford, 31 Md. 219.

[74] Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213; 1 McLean (U. S.), 275; Matthews v. Howard Ins. Co., 11 N. Y. 9; overruling Grim v. Phœnix Ins. Co., 13 Johns. (N. Y.) 451.

down the pipe in the upper room and placed a bed over the hole in the floor, but did not remove the stove and pipe below. Afterward, forgetting what she had done, she built a fire in the stove, which set fire to the bed and burned the house. It was held that assured could recover on the policy.[75] Again, the mixing of inflammable compounds and placing it upon a stove to melt by a druggist, whereby it ignited and caused a fire, is a loss within the policy. The mixing and melting compounds of like character being usual in such business and being known to insurer, is therefore included in the risk.[76] So the putting a stove in an unfinished building and building a fire therein to dry plaster, such act not increasing the risk, is not such negligence as avoids the policy.

§ **2842. Negligence—Acts of Insane Person—Fire Risks.**—The insurer is responsible for the loss of buildings set on fire by the insured's insane wife while left alone by him, where she had been left alone on other occasions and had not committed any wrong or violence.[77] So an insane person can form no wrongful or fraudulent design in destroying his own property so far as insurers are concerned, and the insurers are liable although assured himself burns the property when insane.[78]

§ **2843. Negligence—Habitual Carelessness of Servants.**—If the servants of assured are so habitually and frequently careless in performing their duties, it may be a question whether the failure of the assured to exercise reasonable diligence or to employ faithful servants does not make their acts of negligence those of the master. It is at least held that it does;[79] but it may be suggested that even in such

[75] Mickey v. Burlington Ins. Co., 35 Iowa, 174; 14 Am. Rep. 494.

[76] Brown v. Kings Co. F. Ins. Co., 31 How. Pr. (N. Y.) 508.

[77] Gove v. Farmers' etc. Ins. Co., 48 N. Y. 41; 97 Am. Dec. 572; 2 Am. Rep. 168, 572.

[78] D'Antremont v. Fire Assn. of Philadelphia (N. Y. S. C. 1892), 20 N. Y. Supp. 344; 48 N. Y. St. Rep. 43; 65 Hun (N. Y.), 475; Karow v. Continental Ins. Co., 57 Wis. 56; 46 Am. Rep. 17.

[79] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192.

a case there must be such gross negligence as to evidence fraud, within the meaning of the above rule and under the authorities.

§ **2844. Negligence Partly Ascribable to Insurer.**—If an insurance company, which has insured a steam boiler, co-operates actively in its management with the owner, it is liable for damages occasioned by want of care and skill in its management.[80] Again, where a vessel was grounded in shallow water and partly full, but might have been saved by prompt acting, but the agent employed to take charge of vessels in distress neglected to fulfill his promise, made with the knowledge of the company's attorney in the state, so to do because sent elsewhere by the company's secretary, it was held that the insurers were liable.[81]

§ **2845. Negligence—Accident Insurance.**—In a New York case, where assured attempted to jump upon an omnibus while it was in motion, but slipped and fell, it was held that it was not within the intent of a contract of insurance to prevent compensation because an injury is caused by the negligence or want of due care of the insured, and that insurer was liable;[82] and although the policy provides against liability in case of willful exposure to unnecessary danger, the mere carelessness or negligence of assured is not within the exceptions.[83] And, in Missouri, it has been declared that gross negligence of the insured does not defeat recovery upon an accident policy.[84] So in a Wisconsin case it is declared by the court that it cannot assent to the proposition that because the negligence of assured contributes to produce the injury, it is not an accident such as to render the insurers liable, and that no such limitation of the word "accident" has ever been established,

[80] Van Winkle v. American Steam Boiler Ins. Co. (N. J.), 19 Atl. Rep. 472.

[81] New Orleans & P. etc. Co. v. Louisville Underwriters (C. C. E. D. La.), 45 Fed. Rep. 370.

[82] Champlin v. Railway Pass. Assur. Co., 6 Lans. (N. Y.) 71.

[83] Providence L. Ins. & Ind. Co. v. Martin, 32 Md. 313.

[84] Lovelace v. Travelers' Protect. Assn., 126 Mo. 104; 49 Am. St. Rep. 638.

either in law or common understanding. The court also says: "There is nothing in the definition of the word that excludes the negligence of the injured party as one of the elements contributing to produce the result." That even though there is negligence, the result may be unusual and unexpected and an accident. "The question whether the injured party was guilty of negligence contributing to the accident does not arise at all in this class of cases. I think that is the true conclusion both upon principle and authority, so far as there is any upon the subject, and the only questions are first whether the death or injury was occasioned by an accident within the general meaning of the policy, and if so whether it was within any of the exceptions." And inasmuch as the exception here was against willful and wanton exposure to any unnecessary danger or peril, the court argued that such clause necessarily implied that any degree of negligence short of such willful and wanton exposure, would not prevent a recovery, and that the clause would be useless, superfluous, and without meaning, "if the absence of due care on the part of assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of defendant." The facts of this case were very similar to those of the last case, the assured having attempted to board a slowly moving train of cars, and being killed in consequence.[85] There is much force in the reasoning of the court in this case. An examination of the numerous definitions of an "accident" fails to discover that negligence constitutes such a factor as to prevent a recovery in case of mere negligence, carelessness, or want of due care on the part of assured, and it being once ascertained that the accident is the proximate cause of the loss, and there being no stipulations permitting an inquiry as to negligence, it is difficult to comprehend why an accident policy should be placed on the same ground as to negligence as other contracts, any more than any other contract for insurance. So it is decided in a late case in the federal court of appeals that if the insured suffers death by drowning, then drowning is the sole proximate cause

[85] Schneider v. Provident L. Ins. Co., 24 Wis. 28; 1 Am. Rep. 157, per Paine, J.

of death, without regard to the cause of falling into the water, unless the death would have resulted in any event without the presence of water, and this even though the policy expressly provides that the insurance shall not cover any case where the incidental injury is not "the proximate and sole cause of the disability or death." [86] If it be held that mere negligence, inadvertence, carelessness, or want of due care constitute a defense to an action on an accident policy where the contract does not so stipulate, the same argument would apply here as that above noted by Mr. Justice Story: "If there had been more diligence or less diligence the peril might have been avoided or escaped or never encountered at all," and the "chance of recovery upon a policy for any loss from any peril insured against would of itself be a risk of no inconsiderable hazard." [87] In a Maryland case, where the policy contained a clause providing against willful exposure to unnecessary danger, a locomotive engineer, while in the discharge of his duty and while the train was moving at about eight miles an hour, left the engine in the fireman's charge and went over the tender to set the brakes and check the speed, but slipped, fell, and was killed, and it was held that the company was liable, and that negligence or carelessness could not be availed of as a defense.[88] Opposed to the above decisions and contentions is a Kentucky case, where it is held that an accident policy does not cover an accidental injury to assured's hand, caused by his negligently, carelessly, and inadvertently putting his arm a short distance out of a moving railroad car, whereby his right hand came in contact with a post near by the track.[89] Inasmuch, however, as above stated, as the contract provides for indemnity for injury proximately caused by an "accident," or for the payment of a specified sum in case of accidental injury resulting in death, according to the stipulations, the better authority is, if the policy does not otherwise clearly

[86] Manufacturers' Acc. Indem. Co. v. Dorgan (U. S. C. C. A. 1894), 58 Fed. Rep. 945.

[87] Waters v. Merchants' etc. Ins. Co., 11 Pet. (U. S.) 213.

[88] Wilson v. Northwestern Mut. Acc. Assn. (Minn. 1893), 55 N. W. Rep. 626.

[89] Morel v. Mississippi etc. Ins. Co., 4 Bush (Ky.), 535.

provide, that negligence or mere inadvertence or carelessness of assured does not of itself constitute a defense, although it may have occasioned the accident or contributed thereto. So it is said by the court in a Maryland case that the same construction as to negligence of assured or his agents applies in accident policies as in fire insurance.[90]

§ 2846. Same Subject—Where Policy Stipulates for Due Care.—The policy frequently stipulates in express words or by words bearing such construction for the exercise of due diligence for self-protection, or due diligence for personal safety and protection, or for a compliance with all rules and regulations of carriers, but even in such cases the courts have hesitated to impose undue burdens upon the assured. Thus, where the policy provided for a "compliance with all rules and regulations of such carriers and not neglecting to use due diligence for self-protection," it was held that only such rules as a general traveler ought to or might reasonably be presumed to know were binding upon assured, and that he was only obliged to exercise such care as a prudent man would exercise under all the circumstances, and that a traveler by railroad from Chicago to a point beyond Kankakee was not obliged to remain constantly within the car, but might leave it and return, and the train having started before his return, he might make an effort to regain his car, and if, in so doing, he slips, falls, and is killed, the insurer is liable for the accident.[91] So in an Iowa case it is held not negligence per se to ride upon a platform of a street-car, and that if the evidence is conflicting, a verdict that assured was using due care will not be disturbed.[92] Although it was also said in this case that the finding was justified, that the death was such a misfortune and an unforeseen event as to be accidental, within

[90] Providence Life Ins. Co. v. Martin, 32 Md. 313, per the court. The rule was held to apply with more force where willful exposure to unnecessary danger was an exception in the policy.

[91] Tooley v. Railway Pass. Assur. Co., 3 Biss. (C. C.) 399. See Standard L. & Acc. Ins. Co. v. Jones (Ala. 1892), 10 S. Rep. 530.

[92] Southerland v. Standard L. & A. Ins. Co. (Iowa, 1893), 22 Ins. L. J. 353; 54 N. W. Rep. 453.

the meaning of the policy, "unless the fact of negligence or misconduct was established to defeat such a conclusion." Again, where the clause was "due diligence for his personal safety and protection," it was held no defense that insured was standing upon the joist of his barn which was building, when it broke and he was killed in consequence.[93] If the contract except loss occasioned by willful exposure to unnecessary danger, it is said that the observance of due care and diligence on the part of assured is no element of the contract on his part," because the language of the exception by the terms of the exclusion, shows that all accidents resulting from mere negligence or carelessness are insured against.[94]

§ **2847. Negligence — Fidelity Guarantee.** — In this class of insurances negligence has relation to the exercise by the employee of reasonable diligence and skill in the performance by him of the duties of his office, position, or employment, and also to the diligence or negligence of the employer with relation to acts of the employee and the contract with the insurer. The exact terms of the contract are important in all cases, according to which neglect of the employee or employer may or may not discharge the insurer. This question has however, been considered elsewhere at length.[95]

§ **2848. May Gross Negligence Evince a Fraudulent Design.**—In fire risks a point which is presented by the cases is where ample preventive means to stay the ravages of fire are available, and the assured neglects to use all reasonable exertions to save his property, or where at the commencement of a fire, the assured stands by and, having means at hand to extinguish the fire and prevent its igniting the building, or its having ignited and having means to prevent it from spreading further, he negligently or carelessly permits it to burn, where-

[93] Stone v. United States Casualty Ins. Co., 34 N. J. 371.

[94] Providence L. Ins. etc. Co. v. Martin, 32 Md. 313, per the court.

[95] Section 2766, herein, on employee's fidelity; Shepherd v. Beecher, 2 P. Wms. 288; Atlantic & P. Ins. Co. v. Barnes, 64 N. Y. 385; 21 Am. Rep. 621; Trent Nav. Co. v. Harley, 10 East, 34.

by the property is injured or destroyed. In such cases there is something more than mere negligence, for if the assured has failed to exercise good faith and common honesty, there might be room for a fair inference of such gross negligence as evinces a fraudulent purpose or design, or at least such a willingness that the question might arise whether the insurers could avail themselves of such acts as a defense.[96] It may be stated, however, that even in such cases all the surrounding circumstances ought to be fairly considered, for such acts, under the particular facts of a case, might not justify an inference of a willingness having the character of a fraudulent purpose or design, and the question should be fairly presented by the evidence and be left to the jury, for there is a distinction between a mere omission to do a thing which a prudent person might have been expected to do and a fraudulently and willfully negligent act.[97] So that although it is held that if the negligence is so gross as to authorize the presumption of fraud, the insurer is not liable;[98] nevertheless, the said ruling must be deemed subject to the above qualification in an instruction to the jury, inasmuch as the words were, "gross carelessness or gross misconduct of the insured."[99] The extent of the obligation resting upon assured in fire and marine cases to exert himself for the safety and protection of the insured property in case of the operation of the peril or of a

[96] Gove v. Farmers' etc. Ins. Co., 48 N. W. Rep. 41; 2 Am. Rep. 168; 97 Am. Dec. 572, per Nesmith, J.; citing Chandler v. Worcester Mut. F. Ins. Co., 3 Cush. (Mass.) 328, per Shaw, C. J., who says: "The doing of nothing when the slightest care or attention would prevent a great injury manifests a willingness, differing little in character from a fraudulent or criminal purpose, to commit such injury." See Devlin v. Queen Ins. Co., 46 U. C. R. 111; Chandler v. Worcester Mut. F. Ins. Co., 3 Cush. (Mass.) 328.

[97] Gove v. Farmers' etc. Ins. Co., 48 N. W. Rep. 41; 2 Am. Rep. 168; 97 Am. Rep. 572, per Nesmith, J.; Catlin v. Springfield F. Ins. Co., 1 Sum. (C. C.) 434; West v. Reid, 2 Hare, 249; Aurora F. Ins. Co. v. Johnson, 46 Ind. 315; Goodman v. Harvey, 4 Ad. & E. 876.

[98] National Ins. Co. v. Webster, 83 Ill. 470; Fleisch v. Insurance Co. of North America (St. L. C. A. 1894), 23 Ins. L. J. 634; Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Phœnix Ins. Co. v. Sullivan, 39 Kan. 449.

[99] Mueller v. Putnam F. Ins. Co., 45 Mo. 84.

threatened peril has been considered elsewhere,[100] but this question here differs from that in this, that the point here is whether gross negligence may evince a fraudulent purpose.

§ 2849. Shipowners' Protective Associations—Indemnity for Losses by Negligence, etc.—In England certain clubs exist for the mutual protection of members against certain losses, which are a class of insurance companies or mutual insurance associations providing indemnity for losses of various kinds to its members.[101] And where a like association agreed to indemnify a member against loss or damage to goods or merchandises caused by the improper navigation of the ship, it was held that negligence of the owner or of his servants, arising before the commencement of the voyage, which would and did affect the safe navigation of the ship, is such improper navigation with regard to the safety of the goods as to be within the operation of the words in the deed or articles of association, and so warrant a recovery, and that the words "improper navigation" had reference not only to the navigation of the ship, but also to the improper navigation with reference to the safety of the goods, and it was said that there might be "navigation" without any voyage at all."[102]

§ 2850. Loss Directly Caused by Negligence of Assured or his Agents—Marine Risks.—If a loss is directly caused by the negligent acts of omission or commission of the assured or his agents, and no peril insured against by the express terms of the contract supervenes, the underwriters are not liable, and this includes misconduct of the assured or his mismanagement, as well as the mismanagement or negligence of the master and mariners, so far as they may be held to represent the assured as his agents exercising the discretion and

[100] See secs. 2811, 2818, herein.

[101] As to shipowners' protection societies or clubs, see 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 23, notes 152-54; 2 Arnould on Marine Insurance, 737.

[102] Carmichael v. Liverpool Sailing Shipowners' Mut. Indem. Assn., 19 Q. B. D. 242; 56 L. J. Q. B. 428; Good v. London Steamship Owners' Assn., L. R. 6 Com. P. 563.

acting in pursuance of and within the limit of the authority conferred, and this also includes loss which is the proximate effect of gross ignorance or willful reckless misconduct of the assured.[103] The qualification above stated as to agents of assured should not be ignored, for the main difficulty in applying the rule arises from determining who are assured's agents and the extent of their authority, for though the maxim respondeat superior applies, yet it certainly ought not to be extended beyond the strict limits of the agency, and perhaps not to that extent, where assured acts with good faith and fidelity, or where there is a mere mistake of judgment done in good faith.[104] This question bears some analogy to that involving the duty of the master to repair a subsequently arising defect of unseaworthiness considered elsewhere.[105] If the agency is created by the operation of a statute enforced by a penalty, and is not a voluntary one, as in the case of the employment of a pilot, this is not such an agency as to release the assurers in case of a loss by the perils insured against directly occasioned by such pilot's negligent acts.[106] As to the negligence

[103] Ludlow v. Columb. Ins. Co., 1 Johns. (N. Y.) 335; Metcalf v. Parry, 4 Camp. 123; Schieffelin v. New York Ins. Co., 9 Johns. (N. Y.) 21; Bell v. Carstairs, 14 East, 379, 374; Bradford v. Levy, 2 C. & P. 137; Tanner v. Bennett, Ry. & M. 182; Cleveland v. United Ins. Co., 8 Mass. 308; Dawson v. Atty, 7 East, 367; Vandenhenvel v. United Ins. Co., 2 Johns. Cas. (N. Y.) 127; Tatham v. Hodgson, 6 Term Rep. 656; Ellery v. New England M. Ins. Co., 8 Pick. (Mass.) 14; Livingston v. Maryland Ins. Co., 7 Cranch (C. C.), 506; Thompson v. Hopper, 6 El. & B. 191, per Lord Ellenborough; Siordet v. Hall, 4 Bing. 607; Carstairs v. Allnutt, 3 Camp. 497; The Titania, 19 Fed. Rep. 101; Coffin v. Newburyport Ins. Co., 9 Mass. 436; Emerigon on Insurance, Meredith's ed. 1850, c. xii. sec. 2, p. 290, et seq. The Ordonnance, however, considers the master and mariners the agent of assured.

[104] See Orient Mut. Ins. Co. v. Adams, 8 Sup. Ct. Rep. (U. S.), per Harlan, J.; citing American Ins. Co. v. Insley, 7 Pa. St. 229, per Gibson, C. J. See, also, Soares v. Thornton, 1 Moore, 373, per Gibbs, C. J.; Copeland v. New England M. Ins. Co., 2 Met. (Mass.) 443, per Shaw, C. J.; The Adonis, 5 C. Rob. 256, per Sir Wm. Scott; Wilbraham v. Wartnaby, Lloyd & W. 144.

[105] Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; 14 Fla. 73.

[106] See Carruthers v. Sydebotham, 4 Moore & S. 47; The Agricola, 2 W. Rob. 95; The Carolus, 2 Curt. (C. C.) 69, per Curtis, J.

of the master in not taking on board a pilot, this has been considered under the question of seaworthiness.

§ **2851. Wrongful, Fraudulent and Criminal Acts of Assured—Attempts to Defraud—Burning Vessel.**—A party is not permitted to insure against his own knavery. Public policy does not sanction such contracts, and the assurer is not liable for the willful, reckless, or fraudulent acts of the assured, nor for his acts of bad faith, misconduct, or wrongdoing.[107] This rule does not bind the assured for the willful or fraudulent acts of third parties done without his knowledge, consent, or connivance.[108] Although the fact that such parties have threatened to burn the insured premises, if known by him when effecting the policy, and not disclosed, is important upon the question of recovery. If one beats his insured mare with an iron rod so that she dies, he cannot recover the insurance;[109] and it is a good defense that the insured set fire to the property.[110] And if one submits herself to an illegal operation to procure an abortion public policy forbids a recovery.[111] As between the beneficiary who commits murder to obtain the insurance and the insurers, the murder is a defense, but as between the assured's legal representatives and the insurers public policy does not prevent a recovery.[112] An act of Congress which provides for the punishment of a conspiracy to burn or destroy any vessel or cargo with intent to

[107] Huckins v. People's Mut. F. Ins. Co., 11 Fost. (N. H.) 238; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; Robinson v. Mercer Co. Mut. F. Ins. Co., 3 Dutch. (N. J.) 134; Western Horse & Cattle Ins. Co. v. O'Neill, 21 Neb. 548; Henderson v. Western M. & F. Ins. Co., 10 Rob. (La.) 164; Franklin Ins. Co. v. Humphrey, 65 Ind. 549. See Shultz v. Pacific Ins. Co., 14 Fla. 73; Dwyer v. Continental Ins. Co., 57 Tex. 181. See Phœnix Ins. Co. v. Sullivan (Kan.), 18 Pac. Rep. 528.

[108] Walker v. London etc. Ins. Co., Ir. L. R. 22 Ex. 572.

[109] Western Horse & Cattle Ins. Co. v. O'Neill, 21 Neb. 548.

[110] See Butman v. Hobbs, 35 Me. 227; Huchberger v. Merchants' F. Ins. Co., 4 Biss. (C. C.) 265; Thurtell v. Beaumont, 8 Moore, 612; 1 Bing. 339.

[111] Hatch v. Mutual L. Ins. Co., 120 Mass. 550.

[112] Cleaver v. Mutual Rescue F. etc. Assn. (Eng. C. A. 1892), 1 L. R. Q. B. 147; 45 Alb. L. J. 257; (Eng. Q. B. D. 1891) 65 L. T. Rep. 220; 44 Alb. L. J. 382.

injure any underwriter is constitutional, and covers vessels on lakes and rivers as well as upon the high seas. The law covers a conspiracy to destroy the vessel with intent to injure insurers. Actual burning of the vessel or actual injury to insurance offices is not necessary to constitute the offense, although such acts if consummated will evidence the conspiracy, if done by defendants or by one aiding and abetting them.[113] But a vessel may be burnt to prevent its falling into the enemy's hands, and a recovery may be had for its loss.[114]

§ 2852. Malicious Acts of Insurance Officers in Refusing to Insure.—An action cannot be maintained against officers of insurance companies on the ground that their acts were those of maliciously conspiring and combining to refuse insurance.[115]

[113] United States v. Cole, 5 McLean (U. S.), 513; Acts of Congress, March 3, 1825, sec. 23; United States v. Johns. (U. S. C. C. 1806), Acts of Congress of March 26, 1804.

[114] Gordon v. Rimmington, 1 Camp. 123.

[115] Hunt v. Simonds, 19 Mo. 584.

CHAPTER LX.

SPECIAL RISKS AND LOSSES—ACCIDENT INSURANCE.

§ 2862. Risk and loss in accident insurance—Generally.
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§ 2884. Same subject: Conclusion.
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§ 2862. Risk and Loss in Accident Insurance—Generally.—In considering this question, the construction of the contract is important, for the terms of this class of policies are numerous and various, and during the life of this class of insurances changes in the terms of the contract have been made to meet, by the provisions of the policy, such bjectionable points as have been considered to exist in view of the decisions of the several courts. In arriving at the intention of the parties, the rule obtains in this, as in other insurances, that regard must be had to the objects and purposes intended by the parties. The purpose of issuing and accepting accident policies is to furnish assured a sum of money for accidents and death caused by accidental means,[1] and this may be by way of indemnity against accidents or by the payment of a specified sum upon death caused by accident and involves the question of proximate and remote cause, although some policies use words which affect the question of proximate cause to a certain extent, as where such terms as "secondary cause," [2] "effects of such injury," [3] "immediately," [4] and other qualifying words and exceptions are used. It may also be stated that the same general rules of construction apply in this as in other risks under insurance contracts. These we have noted elsewhere. And the character of the risk is sometimes dependent upon the terms of the contract. Thus, if it is evident from the whole of the contract that the risk is strictly an accident insurance, and not a fire risk, it will be so construed.[5] And the classification may depend upon some stat-

[1] See Healy v. Mutual Acc. Assn., 133 Ill. 556; Employer's Liability Assur. Corp. v. Merrill, 155 Mass. 404, per Barker, J.

[2] Smith v. Accident Ins. Co., 22 L. T. 861.

[3] Isitt v. Railway Pass. Assur. Co., L. R. 22 Q. B. D. 504.

[4] Williams v. Preferred Mut. Acc. Assn., 91 Ga. 698; 23 Ins. L. J. 75; 17 S. E. Rep. 982.

[5] Western Refrigerator Co. v. American Casualty Ins. etc. Co., 51 Fed. Rep. 155.

utory provision, as under a statute providing for the formation of companies to insure against "bodily injuries and death by accident." [6] A distinction has been made between accident and casualty insurance, in that the former insures against accidents resulting in bodily injury and death, and not against loss or damage to property, and that "casualty" insurance covers boilers, plate glass, etc., risks; and it is held that policies of insurance to indemnify the assured as owner of a horse, vehicle, or elevator causing accidental personal injuries for which he may be legally liable against claims for compensation therefor, or as landlord or tenant for such injuries to persons other than employees or persons injured by elevators, or as a builder or contractor for such injuries to workmen employed by other contractors, and to the public for such injuries caused by the assured and his own workmen but not caused by a subcontractor or his workmen, all covered legitimate varieties of accident insurance.[7] Again, in accident policies a distinction is made between the insurer and a carrier. Thus it is said, in connection with the meaning of the words "rule of a corporation" and assured's binding knowledge thereof, that insurer, under an accident policy insuring against loss by accidental injury or death, is not as to its policy holders "at all in the position of a carrier for hire as to its passengers. The latter is engaged in a special service of peculiar danger, as to which some rules of contract on the part of its patrons are highly necessary. The former assumes a guardianship of its patrons in respect to the casualties of life which beset men everywhere, and as to which it is not practicable to impose limitations which shall be constantly borne in mind by the insured." [8] In accident insurance the party does not receive the money "because of the accident, but because he has made a contract providing for the contingency. An accident must oc-

[6] Mass. Acts 1887, c. 214, sec. 29, cl. 5.

[7] Employer's Liability Assur. Corp. v. Merrill, 155 Mass. 404; 29 N. E. Rep. 529, per Barker, J. "Casualty insurance" defined in a Minnesota case: State ex rel. Clapp v. Federal Inv. Co., 48 Minn. 110; 50 N. W. Rep. 1028; 21 Ins. L. J. 226.

[8] Marx v. Travelers' Ins. Co., 39 Fed. Rep. 321, per Hallett, J.

cur to entitle him to it, but it is not the accident but his contract which is the cause of his receiving it." [9]

§ 2863. "Accident" Defined—Distinction between Accidental Death and Accidental Means.—An accident may be anything that begins to be, that happens, or is a result which is not anticipated, but is unforeseen and unexpected by the person injured or affected thereby. It must also not only begin to be, happen, or result without assured's foresight or expectation, but without design or intentional causation on his part. It is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected. Vis major is involved, and perhaps necessarily some violence, but violence is not accident. The event may proceed from an unknown or from a known cause, for it is not essential that the cause should be unknown. It may be an unusual event attending the performance of a usual and necessary act, or an unusual effect of a known cause. An accident may occur with or without human agency, and in the latter case may happen through a person's own agency in an undesigned, unforeseen, and unexpected way, or through the agency of another person. Where the agency of another is the moving cause or the immediate cause, the act may in itself be intentional, but result in unintentional injury to the assured, or it may be an unintentional act resulting in injury to assured or an intentional act resulting in injury to assured, but the result to the latter is unforeseen and unexpected by him and a result to which he, the injured party, has in no way designedly contributed; but if assured has voluntarily co-operated or participated in an act resulting in the intentional infliction upon him of injury by another, as in case of an encounter, such injury is deemed to be a result so far reasonably to be expected and foreseen as probable to occur that it is not an accident, but an injury in a fray, without voluntary co-operation or fault of assured, may be an accident. The above definitions or deduc-

[9] Bradburn v. Great Western Ry. Co., L. R. 10 Ex. 1, 3; 23 Week. Rep. 48.

tions are supported by the definitions of the courts and the decided cases and rules under this chapter. In this connection it may be noted that the language of the policy may it is held warrant a distinction between accidental death and accidental means. Thus in case of an insurance against death from bodily injury caused by violent, accidental, external, and visible means, the court said: "A person may do certain acts the result of which acts may produce unforeseen consequences and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental." [10] This distinction is more clearly apparent where the policy uses words intended to qualify or extend the rule as to proximate and remote cause, as where the provision is "shall die from the effects of such injury." Here the death need not be immediately caused by the injury, yet if the injury was immediately caused by the accident, and the death ensued as a natural consequence or effect of the injury, then the assurer is liable.[11] The deduction is made from a case in the United States supreme court that it is not enough that assured might not have foreseen the consequences. "It is enough if he ought to have foreseen." [12] This opens up a wide range of possibilities in the way of a defense, and involves clearly the question of negligence. In numerous cases the courts have held injuries to be accidents or accidental when clearly they ought by any reasonable prudent man to have been foreseen. This is largely so in cases of negligence or where want of due care exists. To "foresee" is to "see beforehand; to see or know before occurrence; to have prescience of; to foreknow; 'a prudent man foreseeth the evil.' " [13] The court could not have intended to say more than this: that an "accident" must not

[10] Clidero v. Scottish Acc. Ins. Co., Lim. (Scot. Ct. Sess. 1892), 29 Scot. L. Rep. 303.

[11] Isitt v. Railway Pass. Assur. Co., L. R. 22 Q. B. 504. As to what is death by accidental means, see note 8 Am. St. Rep. 763.

[12] 2 May on Insurance, 3d ed., sec. 520, n. 3; relying upon United States Mut. Acc. Ins. Co. v. Barry, 131 U. S. 300.

[13] Webster's Unabridged Dictionary, "Foresee."

only be unforeseen, but must also be something which happens out of the usual course of things, something unusual, fortuitous, an unusual event, effect, result, not ordinarily following the performance of an act, and not naturally to be expected.[14]

[14] *"Accident" and "Accidental" Defined by the Courts, etc.*—The word "'accident' should be given its ordinary and usual signification, as being an event that takes place without one's foresight and expectation": Supreme Council of Order of Chosen Friends v. Garrigus, 104 Ind. 133, 140, per Zollars, J. "In general, anything that happens or begins to be without design, or as an unforeseen event; that which falls out by chance; a fortuitous event or circumstance. . . . . The operation of a chance; the undesigned contingency; a happening without intentions; causation, chance, fortuitous, as it were, the result of accident": Century Dictionary, "Accident." "An event which takes place without one's foresight or expectation; an event which proceeds from an unknown cause, and therefore not expected; chance, casualty, contingency": Webster's Unabridged Dictionary, "Accident"; North American L. etc. Ins. Co. v. Burroughs, 69 Pa. St. 43, 51; 8 Am. Rep. 212, 216, per Williams, J.; Schneider v. Provident L. I. Co., 24 Wis. 28, 31, per Paine, J.; Brown v. United States Mut. Acc. Assur., 44 Hun (N. Y.), 599, 607, per Learned, P. J. (the decision itself was reversed in 123 N. Y. 304); Ripley v. Railway Pass. Assur. Co., 2 Big. L. & A. Cas. 738. "'Accident' must be given its popular meaning; that is, a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured": Richards v. Travelers' Ins. Co., 89 Cal. 170, 175; 23 Am. St. Rep. 455, 458, per McFarland, J. "Perhaps, in a strict sense any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design and is expected is a foreseen and foreknown result, and therefore not strictly accident; . . . . in the more popular and common acceptation 'accident, if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event.' I think, in construing a policy of insurance against accident issued to all sorts of people, a majority of whom do not, as the company well know, nicely weigh the meaning of words and terms used in it, the courts are called upon to interpret the contract as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called 'accident.' The company fix the terms of the contract, and are to be held, in the absence of plain, unequivocal exceptions and provisions, to intend what in popular acceptation the insured party is likely to understand by its terms": Ripley v. Railway Co., 2 Big. L. & A. Cas. 738, 742; 16 Wall. (U. S.) 336; cited in Richards v. Travelers' Ins. Co., 89 Cal. 170, 171, 176. "An unusual

§ 2864. What Constitutes an Accident—Cases.—The following have been held "accidents" or "accidental": Fall-

and unexpected result attending the performance of a usual and necessary act"; "an event which took place without his (assured's) foresight or expectation, and therefore clearly an accident," and therefore an "accident" in the common acceptation of the term: Providence L. Ins. etc. Co. v. Martin, 32 Md. 310, 314, 315. "An accident is the happening of an event without the aid and the design of the person, and which is unforeseen": Paul v. Travelers' Ins. Co., 112 N. Y. 472, 478; 8 Am. St. Rep. 758, 762, per Gray, J. "Death by any unexpected event which happens as by chance, or which does not take place according to the usual course of things": North American Ins. Co. v. Borroughs, 69 Pa. St. 43, per Williams, J. See Southard v. Railway Pass. Assur. Co., 34 Conn. 574. "Accidental signifies 'happening by chance or unexpectedly taking place not according to the usual course of things; casual; fortuitous. We speak of a thing as accidental when it falls to us as by chance out of the regular course of things; as an accidental meeting, an accidental advantage, etc.' ": North American L. & A. Ins. Co. v. Borroughs, 69 Pa. St. 43; 51 Am. Rep. 212, 216, per Williams, J.; cited in Bacon v. United States Mut. Acc. Assur., 44 Hun (N. Y.), 599, 607, per Learned, P. J. The decision itself was reversed in 123 N. Y. 304. The term "accidental" is used in its ordinary popular sense, and in that sense means "'happening by chance; unexpectedly taking place, not according to the usual course of things'; or not as expected. In other words, if a result is such as follows from ordinary means voluntarily employed in a not unusual and unexpected way, then, I suppose, it cannot be called a result effected by accidental means. But if in the act which precedes the injury something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted from the accident, or through accidental means": Barry v. United States Mut. Acc. Assur., 23 Fed. Rep. 712, 714, per Dyer, J. In the term " 'accident' some violence, casualty, or vis major is necessarily involved. We cannot think that disease produced by the action of a known cause can be considered as accidental. Thus, disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, be properly said to be accidental, unless at all events the exposure is itself brought about by circumstances which may give it the character of accident": Sinclair v. Maritime Pass. Assur. Co., 3 El. & E. 478, 485; 2 Big. L. & A. Ins. Cas. 596, 600, 601, per Cockburn, C. J. "The definition of an accident generally assented to is an event happening without any human agency, or, if happening through human agency, an event which under the circumstances is unusual and not expected to the person to whom it happens"; McGlinchey v. Fidelity & Casualty Co., 80 Me. 251, 253; 6 Am. St. Rep. 190, per Peters, C. J. "An accident may happen from an unknown cause, but it is not essential that the cause should be unknown. It may be

ing between cars and being killed while in the discharge of duty;[15] being injured in an affray without voluntary participation or fault of assured;[16] accidentally taking poison or an

an unusual result, and therefore unexpected to the party": Schneider v. Provident L. Ins. Co., 24 Wis. 28, 30; 1 Am. Rep. 157, 158, per Paine, J. "An injury not anticipated and not naturally to be expected by the assured, though intentionally inflicted by another, is an accidental injury," except there is a provision against intentional killing by another: Insurance Co. v. Bennett, 90 Tenn. 256, per Snodgrass, J. See Accident Ins. Co., v. Crandall, 120 U. S. 527, per Gray, J. "Accidents are of two kinds: 1. Those that befall a person without any human agency; as a killing of a person by lightning; . . . . 2. Those that are the result of human agency. The latter are divided as follows: 1. That which happens to a person by his own agency; as if he is walking or running and accidentally falls and hurts himself; . . . . 2. That which befalls a person by the agency of another person, without the concurrence of the latter's will; as where one standing on a scaffold unintentionally lets a brick fall from his hand and it strikes the person below; . . . . 3. That which a person unintentionally does whereby another is unintentionally injured; as where one intentionally fires a gun in the air and accidentally shoots another person; . . . . 4. If one person intentionally injures another, which was not the result of an encounter or the misconduct of the latter, but was unforeseen by him, such injury, as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, it is to him accidental, although inflicted intentionally by the other party": Hutchcraft Ex'rs. v. Travelers' Ins. Co., 87 Ky. 300, 301, et seq.; 12 Am. St. Rep. 484, per Bennett, J. Whether this last instance would be within the meaning of the term "accidental" will be noted farther on in the consideration of the class of cases as to whether "intentionally" is an "accidental means." A railway accident is defined as "an accident occurring in the course of traveling by a railway and arising out of the fact of the journey. It does not necessarily depend on any accident to the railway or machinery": Theobold v. Railway Pass. Assur. Soc., 10 Exch. 45; L. J. Ex. 249, per Alderson, B. "It is difficult to define the term 'accident' as used in a policy of this nature [for granting assurances against loss of life and personal injury arising from accident at sea], so as to draw with perfect accuracy a boundary line between injury or death from natural causes such as shall be of universal application": Sinclair v. Maritime Pass. Assur. Co., 3 El. & E. 478; 2 Big. L. & A. Ins. Cas. 596, per Cockburn, C. J.

[15] Providence L. Ins. & Indem. Co. v. Martin, 32 Md. 310.

[16] Supreme Council v. Garrigues, 104 Md. 303.

overdose of medicine, unless within an exception;[17] death from drowning;[18] a sprain occasioned by lifting;[19] blood poisoning by the inoculation, at the time of receiving a second wound, of virus from a former wound;[20] being run over by a locomotive engine owing to a fall on the track while in a fit;[21] rupture caused by an involuntary movement of the body, or by any unforeseen accident in connection with the use of Indian clubs;[22] accidentally inhaling illuminating gas while asleep;[23] an accidental strain or fright resulting in death and caused by a horse running away;[24] being waylaid and killed by robbers;[25] being shot by an officer of the law who did not design

[17] Penfold v. Universal Life Ins. Co., 83 N. Y. 319; Healey v. Mutual Acc. Assur., 133 Ill. 556; Mutual Acc. & Assur. v. Tuggle, 39 Ill. App. 509; Northwestern L. Ins. Co. v. Hazelett, 105 Ind. 212; 55 Am. Rep. 192. But see Pollock v. Insurance Co., 102 Pa. St. 230; 48 Am. Rep. 204; Bayliss v. Travelers' Ins. Co., 113 U. S. 316; 6 Ins. L. J. 109.

[18] Trew v. Assurance Co., 6 Hurl. & N. 839; 7 Jur., N.S., 878; rev'ng 5 Hurl. & N. 210; 6 Jur., N. S., 799; Mallory v. Travelers' Ins. Co., 47 N. Y. 52; 54 N. Y. 651; 7 Am. Rep. 410, and note, 414; Manufacturers' Acc. Indem. Co. v. Dorgan (7 U. S. C. C. A.) 581; 16 U. S. App. 290; 58 Fed. Rep. 945; Winspear v. Accident Ins. Co., 6 Q. B. D. 42; 43 L. T., N. S., 459; Reynolds v. Insurance Co., 22 L. T., N. S., 820. See Couadeau v. American Acc. Co. of Louisville, 95 Ky. 280; 23 Ins. L. J. 344; 25 S. W. Rep. 6.

[19] Martin v. Travelers' Ins. Co., 11 Fost. & F. 505.

[20] Martin v. Equitable Acc. Assn., 61 Hun (N. Y.), 467; 41 N. Y. St. Rep. 77; 16 N. Y. Supp. 279.

[21] Lawrence v. Accident Assur. Co., L. R. 7 Q. B. D. 216; 50 L. J. Q. B. 522.

[22] McCarthy v. Travelers' Ins. Co., 8 Biss. (C. C.) 362.

[23] Paul v. Travelers' Ins. Co., 112 N. Y. 472; 45 Hun (N. Y.), 313; 20 N. E. Rep. 347; Pickett v. Pacific Mut. L. Ins. Co., 144 Pa. St. 729; 22 Atl. Rep. 871; United States Mut. Acc. Assur. Co. v. Newman, 84 Va. 52. See Richardson v. Travelers' Ins. Co., 46 Fed. Rep. 843; Menneily v. Employers' Liability Assur. Co., 148 N. Y. 596; 54 N. Y. St. Rep. 780; 25 N. Y. Supp. 230.

[24] McGlinchey v. Fidelity & Casualty Co., 80 Me. 251; 14 Atl. Rep. 132.

[25] Ripley v. Railway Pass. Assur. Co., 2 Big. L. & A. Ins. Rep. 738; 16 Wall. (U. S.) 336; Supreme Council of Order of Chosen Friends v. Garrigus, 104 Ind. 140; 54 Am. Rep. 298; Hutchcraft v. Travelers' Ins. Co., 87 Ky. 300. See Phelan v. Travelers' Ins. Co., 38 Mo. App. 640.

killing assured and did not know whom he was killing;[26] death caused while crossing a railroad track at a common crossing, by detached freight-cars which have been "kicked" along the track;[27] injury by the handle of a pitchfork while handling and pitching hay;[28] a shot fired intentionally by an insane person;[29] death by assassination;[30] falling through a bridge;[31] choking to death while attempting to swallow a piece of beefsteak;[32] slipping and falling while leaving a railroad car;[33] death from stumbling and falling against a locomotive engine.[34] Jumping from cars in motion, losing one's balance, and falling or striking against some unforeseen object and slipping in running, it is said might be an accident.[35] Where a guest at a hotel, the proprietor being sick and absent, attempted to forcibly eject another from a hotel and was killed, the death was held accidental.[36] If the means of the injury is not the

[26] Utter v. Travelers' Ins. Co., 65 Mich. 545; 8 Am. St. Rep. 913; 32 N. W. Rep. 812.

[27] Keene v. New England Acc. Assur., 161 Mass. 149; 36 N. E. Rep. 891.

[28] North American Ins. Co. v. Burroughs, 69 Pa. St. 43; 8 Am. Rep. 212.

[29] Marceau v. Travelers' Ins. Co., 101 Cal. 338; 35 Pac. Rep. 856.

[30] Hutcheraft v. Travelers' Ins. Co., 87 Ky. 300; 28 Am. L. Reg. 42; 12 Am. St. Rep. 484; 8 S. W. Rep. 57.

[31] Burkhard v. Travelers' Ins. Co., 102 Pa. St. 262; 48 Am. Rep. 203.

[32] American Acc. Co. of Louisville v. Reigart, 94 Ky. 547; 23 Ins. L. J. 148; 23 S. W. Rep. 191; 42 Am. St. Rep. 374; 21 L. R. Annot. 651.

[33] Theobald v. Railway Pass. Assur. Soc., 10 Exch. 44; 23 L. J. Ex. 248.

[34] Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201; 44 Alb. L. J. 304; 9 S. Rep. 869.

[35] Southard v. Railway Pass. Assur. Co., 34 Co. 574, per Shipman, J.

[36] Lovelace v. Travelers' Protective Assn., 126 Mo. 104; 40 Cent. L. J. 206; 28 S. W. Rep. 877. The opinion of the court, per Barclay, J., in this case is exhaustive. It considers numerous definitions of accident, and cites or considers Sinclair v. Assurance Co., 4 L. T. Rep., N. S., 15; Fenwick v. Schmalz, L. R. 3 Com. P. 313; Ripley v. Railway Assurance Co., 2 Big. L. & A. Rep. 741; Winspear v. Insurance Co., 6 Q. B. D. 42; McGlinchey v. Fidelity etc. Co., 80 Me. 251; Schneider v. Insurance Co., 24 Wis. 28; Keene v. Mutual Acc. Assn., 161 Mass. 149; 36 N. E. Rep. 891; Cornish v. Insurance Co., 23 Q. B. D. 453; Travelers' Ins. Co. v. McConkey, 127 U. S. 661; Phelan v. In-

result of design, the insured may recover for the loss of a hand, caused by falling from a moving car on which he attempts to jump, and such a loss is through violent, external, and accidental means.[37] A nonsuit is not justified by the fact that insured is found drowned near a place where he was seen drunk late at night.[38] Being shot while engaged in an altercation, assured being unarmed, is accidental within the provision, "external, violent, and accidental means." [39]

§ 2865. When Presumption against Suicide.—The presumption is against suicide and in favor of death being accidental, as where insured had disappeared and was thereafter found in the river.[40] Where from the facts of the case it appears that a violent death was either the result of accidental injury or of suicidal act of the deceased, the presumption of law is against the latter.[41] And the law presumes an accidental death where from the evidence it does not appear whether the insured came to his death from a shot from a pistol fired by his own hands or whether he was

surance Co., 38 Mo. App. 640; Hutchcraft v. Insurance Co., 87 Ky. 300; Richards v. Insurance Co., 89 Cal. 170; Supreme Council v. Garrigus, 104 Ind. 133. And the court concludes: "Whether he acted lawfully, as a guest of the hotel during the absence and illness of the proprietor, in attempting to remove Graves from the hotel office by force we think needless to investigate. It may be assumed that by his course of conduct he voluntarily assumed the risks of a fight. But there is nothing in the circumstances to show that he voluntarily assumed the risk of death. We consider his killing an 'accident' in the popular and ordinary sense in which that word is generally used": Id. 116, 117.

[37] Travelers' Preferred Acc. Assn. v Stone, 50 Ill. App. 222.

[38] Couadeau v. American Acc. Co., 95 Ky. 280; 23 Ins. L. J. 344; 25 S. W. Rep. 6.

[39] Robinson v. United States Mut. Acc. Assn., 68 Fed. Rep. 625.

[40] Mallory v. Travelers' Ins. Co., 47 N. Y. 52; Couadeau v. American Acc. Co. of Louisville, 95 Ky. 280; 23 Ins. L. J. 344; 25 S. E. Rep. 6; Washburn v. National Acc. Soc., 32 N. Y. St. Rep. 34; 10 N. Y. Supp. 366; merely noted in 57 Hun (N. Y.), 584. See, also, Star Acc. Co. v. Sibley, 57 Ill. App. 315; citing Chicago etc. R. R. Co. v. Hines, 132 Ill. 161.

[41] Warner v. Accident Assn., 8 Utah, 431, 441, per Miner, J., citing Mallory v. Insurance Co., 47 N. Y. 54.

shot by an assassin or burglar.[42] It is presumed that death is accidental where the lifeless body of an aged man of business habits is found mangled on the railroad track, where it appears that a freight train was standing at the station and that he left the depot to board the same.[43] A jury have a right to presume accidental drowning from the fact that insured was found dead in the water.[44]

§ 2866. What does not Constitute an Accident—Cases.—The following have been held not "accidents" or "accidental": Death consequent upon doing a thing which assured intended to do and was doing, as death resulting from assured's colon slipping out of place while he was pulling on his stockings.[45] The shooting an officer by a prisoner whom the officer is attempting to arrest.[46] Sunstroke and consequent death.[47] Malignant pustule, charbon, or anthrax, caused by the infliction upon the body of a certain kind of animal substance, contact with diseased or putrid animal matter, peculiar to people that handle wools and hides.[48] Death from an epileptic fit.[49] The fit may however, be followed by some cause superinduced thereby, which latter is in itself the efficient moving cause and an accident.[50] Rupture occasioned by swinging Indian clubs, used for exercise in the ordinary way and without the interference of any un-

[42] Warner v. Accident Assn., 8 Utah, 431. See Utter v. Insurance Co., 65 Mich. 545; 32 N. W. Rep. 412.

[43] Meadows v. Pacific Mut. L. Ins. Co., 129 Mo. 76; 24 Ins. L. J. 721; 31 S. W. Rep. 578.

[44] Couadeau v. American Acc. Co., 95 Ky. 280; 23 Ins. L. J. 344; 25 S. W. Rep. 6; considering and citing Trew v. Passengers' Assur. Co., 6 Hurl. & N. 838, per Cockburn, C. J.; Mallory v. Travelers' Ins. Co. 47 N. Y. 52; Winspear v. Accident Ins. Co., 6 L. R. Q. B. D. 42.

[45] Clidero v. Scottish Acc. Ins. Co., Lim. (Scot. Ct. Sess. 1892), 29 Scot. L. Rep. 303.

[46] American Acc. Co. v. Carson (Ky. C. A. 1895), 30 S. W. Rep. 879.

[47] Sinclair v. Maritime Pass. Assur. Co., 3 El. & E. 478; 2 Big. L. & A. I. Cas. 596.

[48] So held in Bacon v. United States Mut. Acc. Assn., 123 N. Y. 304; reversing 44 Hun (N. Y.), 599. But see sec. 2878, herein.

[49] Tennant v. Travelers' Ins. Co., 31 Fed. Rep. 322.

[50] Lawrence v. Accidental Ins. Co., L. R. 7 Q. B. D. 216; Winspear v. Accident Ins. Co., 6 Q. B. D. 42.

usual circumstance.[51] Rupture caused by jumping from a car and running, done voluntarily and for the accomplishment of a business purpose and unattended by any falling or stumbling.[52]

§ 2867. Locomotive Engineer may be Protected by General Ticket Covering Accidents to Travelers—Construction—Intent of Parties.—If insurer issues a ticket to a locomotive engineer with notice and knowledge of the capacity in which the assured is acting, and the ticket is a general one, as contradistinguished from a mere passenger or traveling ticket, sold at a higher price than the latter and designed to include more than the ordinary risk incurred by a passenger or traveler, the insurer will be liable where assured is accidentally killed in his employment while running trains, even though it is stipulated for liability "for death or accident while traveling by public or private conveyance provided for the transportation of passengers." The reasonable inference is, that assured is protected against accidents without regard to the capacity in which he was acting, and were the construction doubtful, assured must be favored, since the notice to and knowledge of insurer justifies the presumption that insured received the impression that the contract protected him while acting in the capacity of engineer, and that assurer intended such protection. In this case the evidence showed that the company sold two classes of tickets, one known as the traveler's risk and the other as general accident, the latter being higher priced.[53] This decision has, however, been criticised.[54]

[51] McCarthy v. Travelers' Ins. Co., 8 Biss. (C. C.) 362.

[52] Southard v. Railway Pass. Assur. Co., 34 Conn. 574, before Shipman, J.

[53] Brown v. Railway Pass. Assur. Co., 45 Mo. 221.

[54] In 7 Am. L. Rev. 604. See in this connection, Northrup v. Railway Pass. Assur. Co., 2 Lans (N. Y.) 166; reversed, 43 N. Y. 516; 3 Am. Rep. 724, where it was declared that "the policy must be construed so as to carry into effect the intention of the parties, so far as such intention can be determined from the language used construed in the light of well-known extrinsic facts, which must be presumed to have been known to the contracting parties at the time of making the contract, and in reference to which it was entered into." And

as is undoubtedly correct, upon the facts before the court, having in view the terms of the contract. This case differs by reason of the character of the ticket from one where the assured, having before him the plain and unambiguous language of the contract, attempts to recover, as was done in a recent Indiana case, on the ground that he supposed from the representations of the agent, which were not binding upon the insurer, that the ticket would cover all classes of accidents, when in fact it neither purported to and clearly did not cover all accidents, and the assured was held bound by the actual contract made, which was "only against the hazard of travel as a passenger on a public conveyance provided by a common carrier," and the assured's railroad travels having been completed, he came to his death by falling from the hayloft of a barn.[55]

§ 2868. **Against Accidental Injuries which shall not be Fatal—Computation of Time—Construction.**—If a policy provides insurance against loss of life from accidental injuries occasioning death within ninety days from the happening of the accident, and also another sum a week not exceeding a designated number of weeks for single personal injuries which shall not be fatal, assured may recover the weekly indemnity when the accident is not fatal within ninety days, even though assured subsequently dies therefrom, and the policy will be construed to mean, as expressed, ninety days from the accident, and not ninety days from the termination of the policy.[56]

§ 2869. **Accidents to Employee in Performance of Services or while Doing Acts Incident to Employment.**—An accident happening to an employee in the performance of his duties as such, or in doing an act incident, necessary, or indispensable to the employment or service in which he is engaged

see c. viii, herein. This last case is commented upon as to the decision itself under the facts in 7 Am. L. Rev. 605. And see Ripley v. Insurance Co., 16 Wall. (U. S.) 336; 2 Big. L. & A. Cas. 738. Both these cases are noted under the next two sections.

[55] Fidelity & Casualty Co. v. Teter, 136 Ind. 672; 36 N. E. Rep. 283.

[56] Perry v. Providence etc. Ins. Co., 103 Mass. 242; 99 Mass. 162.

which is fairly attributable to and would not have happened but for such service, and is traceable to no foreign cause, is within the protection of an insurance against accidents to employees "while in the discharge of duty in the service" of the employer. But such accident must not have happened from any cause foreign to the usual or unusual operation or conduct of the business of the employer. Thus such an insurance covers an accidental death of an employee of a railroad company caused by the cars while the employee was crossing the track on his way home from his day's work, and happening a short time after he had quit work.[57] So where, in the absence of a brakeman, a locomotive engineer, deeming it necessary to be done, attempts to reach a certain car to put on brakes, but slips and falls, it is an unforeseen, unexpected result attending the performance of a usual and necessary act, and therefore an accident and not a case of voluntary exposure to unnecessary danger.[58]

§ 2870. Occupation of Insured—Loss of Time—Change of Occupation.—The word "occupation" has reference to the principal or regular business of a man's life or that to which he devotes his time and attention, such as trade, profession, or other vocation or calling.[59] The assurer is bound by the classification as to the character of the occupation made by it or its general authorized agent,[60] and the classification

[57] Kenney v. Baltimore etc. Employees' Rel. Assn., 35 W. Va. 385; 14 S. E. Rep. 8; 21 Ins. L. J. 176. But see Hull v. Equitable Acc. Assur., 41 Minn. 231; 42 N. W. Rep. 936. Where employer's liability for personal injuries caused by the fall of an ice-house in the process of construction not in the season of cutting ice is held not within the policy, and where evidence of a custom for people in the ice business to erect their own ice-houses was held immaterial, and where it was also declared that the erection of new ice-houses or stables for the enlargement or better accommodation of the business was not an operation connected with the business within the policy, see People's Ice Co. v. Employers' Liability Assur. Corp., 161 Mass. 122.

[58] Providence Life Ins. & Ind. Co. v. Martin, 32 Md. 310.

[59] Union Mut. Acc. Assn. v. Frohard, 134 Ill. 228; 28 N. E. Rep. 642.

[60] New York Acc. Ins. Co. v. Clayton, 8 U. S. C. C. A. 213; 59 Fed. Rep. 559; following Insurance Co. v. Snowden, 7 U. S. C. C. A. 264; 58 Fed. Rep. 342; Insurance Co. v. Robinson, 7 U. S. C. C. A. 444; 58 Fed. Rep. 723.

may not be made after the injury.[61] The fact that the occupation of "pointer" is not classified among the risks does not show that it is not insurable.[62] The classification does not preclude acts or duties which are incident to the occupation designated and in which men in all walks of life are likely to engage, as where a "merchant while hunting sustains an accidental injury." [63] Operating a buzzsaw for amusement is not an occupation incident to that of a "retired gentleman." [64] Disability as a "leather cutter and merchant" must cover both classes to warrant indemnity.[65] One is not a grocer "delivering goods by occupation" where he only occasionally delivers goods.[66] The assurer is liable under a general accident policy for the accidental death of assured while acting as brakeman, even though he had stated his occupation to be that of switchman, where the contract does not limit him to the exercise of the occupation of switchman, and does not exempt him from liability for accidents from causes not connected with such occupation.[67] A "brick mason" includes, as a part of the trade, that of a "pointer" up of walls.[68] The occupation of "farmer" does not prevent assured from engaging in a work of humanity, such as rescuing shipwrecked persons, and he does not by such act become a wrecker.[69] So a "supervising farmer" does not engage in the occupation of bridge-builder by merely building a bridge upon the farm, nor does he become a pile-driver by carrying large bridge supports and driving them into the ground with an axe.[70] If a policy pro-

[61] Bushaw v. Women's Mut. Ins. etc. Co. (1889), 8 N. Y. Supp. 423.

[62] Wilson v. Northwestern Mut. Acc. Assur., 53 Minn. 470; 55 N. W. Rep. 626.

[63] Union Mut. Acc. Assn. v. Frohard, 134 Ill. 228; 28 N. E. Rep. 642.

[64] Knapp v. Preferred Mut. Acc. Assn., 53 Hun (N. Y.), 84; 6 N. Y. Supp. 57; appeal dismissed without opinion, 130 N. Y. 635.

[65] Ford v. Union States Mut. Acc. Rel. Co., 148 Mass. 153.

[66] Hall v. American Mas. Acc. Assn., 86 Wis. 518; 57 N. W. Rep. 366.

[67] Providence L. Ins. Co. v. Fenell, 49 Ill. 180.

[68] Wilson v. Northwestern Mut. Acc. Assn., 53 Minn. 470; 55 N. W. Rep. 626.

[69] Tucker v. Mutual B. L. Co. of Hartford, 50 Hun (N. Y.), 50; 4 N. Y. Supp. 505.

[70] National Acc. Soc. v. Taylor, 42 Ill. App. 97.

vides that if an accidental injury creates a disability the assured shall be paid a certain sum per week for the immediate, continuous, and total loss of such business time as may result from such injury, he is entitled to recover if his injury is such that he loses his time in the business in which he was engaged when insured, though there are other business pursuits from which the accident would not incapacitate him.[71] The fact that one is insured as an "auctioneer" does not preclude his hunting. Such act is not so extraordinary as to excite attention as a departure from what an individual may be expected to do.[72] Buying horses is not inconsistent with the business of an "auctioneer," or a trip west for that purpose, nor does it show a change of occupation.[73]

§ **2871. Accident while Boarding Moving Conveyance —Commencing or Continuing Travel—Traveling.**—Assured may be so far justified in attempting to board a slowly moving train, on which he desires to leave on a journey or to continue one, as to be entitled to recover for an accidental injury sustained while so doing, for a passenger must get into the conveyance. Such act is a necessary one, and if the injury cannot be disconnected with an act immediately connected with being a traveler by that conveyance,[74] and if assured sustains an accidental injury while attempting to board a public conveyance, such as an omnibus, while it is moving, the injury is sustained while traveling.[75] Liability for accidents

[71] Pennington v. Pacific Mut. L. Ins. Co., 85 Iowa, 468; 39 Am. St. Rep. 306. If one is insured as "superintendent" of a railway, and insurer has knowledge that his duties require him to get on and off trains in motion, and the evidence shows the fact, the condition does not apply, and the company is liable for death sustained while getting on a train in motion: Accident Ins. Co. of North America v. McFee (Mont. L. Rep.), 7 Q. B. 255.

[72] Star Acc. Co. v. Sibley, 57 Ill. App. 320; 27 Chic. Leg. News, 204. per Wateman, P. J.

[73] Star Acc. Co. v. Sibley, 57 Ill. App. 320; 27 Chic. Leg. News, 204, per Waterman, P. J.

[74] See Schneider v. Provident L. Ins. Co., 24 Wis. 28; 1 Am. Rep. 157; Tooley v. Railway Pass. Assur. Co., 3 Biss. (C. C.) 399; 4 Big. L. & A. Ins. Rep. 34; 2 Ins. L. J. 27.

[75] So declared in Champlin v. Travelers' Pass. Ins. Co., 6 Lans. (N. Y.) 71, per Gilbert, J.

occasioned by such acts may, however, as in other matters, be excluded by the terms of the policy.[76] If one alights from a railroad train at a station, from which by another train he intends to continue his journey, and is injured by falling while crossing the platform of a car intending to speak to the engineer about a matter unconnected with his journey or his condition as a passenger, he is not at the time of the accident a passenger in a public conveyance.[77]

§ 2872. Walking as Part of a Continuous Journey to make Necessary Connections while Traveling by Public or Private Conveyance.—If a person is insured under a contract covering death by accident while traveling by public or private conveyance provided for the transportation of passengers, the contract protects him while walking as a part of a continuous journey to make connections between such conveyances as are necessary to be taken in the actual prosecution of his travels. Such walking is the actual and necessary accompaniment of such travel, for a person may go from a train to a ferryboat, or vice versa, or from one train to another as a part of a continuous journey, and the fact that a carriage may be had for the distance walked, or that it is a few steps more or less, can make an injury received while so walking none the less an injury received while traveling by a public or private conveyance.[78]

§ 2873. Traveler not Bound to Remain Inside Cars Stopping Several Minutes at Intermediate Station.—One insured against accidents while actually traveling in a public conveyance provided by a common carrier for transporting passengers is not obliged to remain inside the car from the inception of his journey till its termination, but may leave

[76] Miller v. Travelers' Ins. Co., 39 Minn. 548.

[77] Hendricks v. Employers' Liability Assur. Corp. (U. S. C. C. N. D. Mo. 1894), 24 Ins. L. J. 69; 62 Fed. Rep. 893.

[78] Northrup v. Railway Pass. Assur. Co., 43 N. Y. 41; 3 Am. Rep. 724; reversing 2 Lans. (N. Y.) 166. In this case assured while prosecuting a journey, while passing on foot by the usual route from a steamboat landing to railway station about seventy rods distant, slipped and fell, receiving injuries which caused death.

and return to the car when it stops at an intermediate station several minutes. He is nevertheless a traveler by such act, and if he sustains an accidental injury in seeking, while the train is in motion, to regain his place, the assurer is liable; and this rule has been applied where the train has stopped for coal and water.[79]

§ 2874. Accident while Doing Necessary Act as Passenger at Time of Completion of Journey.—Even though the journey may have terminated by the conveyance in which assured is traveling having reached assured's destination on that line of travel, yet the insured is protected in doing the necessary act of leaving the conveyance, and until he has safely landed, for until then he is still a traveler by that particular conveyance; and if he sustains an accidental injury at the time of leaving or alighting from such conveyance, such accident arises directly out of an act immediately connected with his being a passenger.[80]

§ 2875. Accident after Completion of Travel as Passenger on a Public Conveyance.—An insurance covering accidental injury or death "only" during "travel as a passenger on a public conveyance provided by a common carrier" does not protect assured against accident resulting from an act entirely foreign to that of a traveler by public conveyance, and in the performance of which he has engaged after the completion of a journey by a public conveyance of a common carrier.[81]

§ 2876. Walking not for Purpose of Making Traveling Connections, but to Terminate Journey after Leaving Public Conveyance.—If the contract covers accident or death from violent or accidental means while traveling by public or private conveyance, and the act of walking is not for the purpose of making connections between such

[79] Tooley v. Railway Pass. Assur. Co., 3 Biss. (C. C.) 399; 4 Big. I. Cas. 34; 2 Ins. L. J. 275.

[80] Theobald v. Railway Pass. Assur. Soc., 23 L. J. Ex. 249; 10 Exch. 45.

[81] Fidelity & Casualty Co. v. Teter, 136 Ind. 672; 36 N. E. Rep. 283.

conveyances as are necessary to be taken in the actual prosecution of a continuous journey, but the assured, after leaving a public conveyance at the terminus of its line of travel, has chosen to finish his journey by walking to his destination, an injury sustained while so walking, and resulting in death, is not within the protection of the contract, even though the injury is caused by violent or accidental means.[82]

§ 2877. Taking Poison or an Overdose of Medicine. If poison or an overdose of medicine is inadvertently or accidentally taken, the case involves some degree of negligence, but the insurer has been held liable as for death received by or through external violent and accidental means. Thus where an overdose of laudanum was taken by mistake it was held within such a clause.[83] So, also, where poison was accidentally taken, it was held in Illinois a death through violent means;[84] and other cases are to the same effect.[85] In the Illinois case above noted the court, per Craig, J., says: "A policy of accident insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to the subject to which it is applied.[86] . . . . Keeping in view these well-settled rules of construction, the question to be determined is, whether the death in this case is one falling within the spirit of the policy. The death of John Healey, the assured, is a conceded fact, but it is said the policy is an assurance against death by external, violent, and accidental means, within the meaning of the policy. Under the averments of the first and second counts, it is manifest that death ensued by accidental means, as it is expressly averred that death was produced by accident-

[82] Ripley v. Railway Pass. Assur. Co., 16 Wall. (U. S.) 368; 2 Big. L. & A. Ins. Rep. 738. See preceding section.

[83] Mutual Acc. Assn. v. Tuggle, 39 Ill. App. 509.

[84] Healy v. Mutual Acc. Assn., 133 Ill. 556; 25 N. E. Rep. 52; 23 Am. St. Rep. 637, 640, 641.

[85] See Northwestern Mut. L. Ins. Co. v. Hazelett, 105 Ind. 212; 55 Am. Rep. 192; Penfold v. Universal L. Ins. Co., 85 N. Y. 319.

[86] Insurance Co. v. Nelson, 65 Ill. 420.

ally taking and drinking poison. The demurrer admits the averment of the declaration, and the fact that death ensued from accidental means stands admitted by the record. But to bring the case within the terms of the policy, it devolved upon the plaintiff to aver and establish, not only that death ensued from accidental means, but also from external and violent means. The next inquiry, therefore, to be determined is, whether within the meaning of the policy death resulted from external and violent means. While the authorities in cases similar to the case before us are not entirely harmonious, yet we think that the decided weight of authority is in support of the view that death in this case was caused by external and violent means." [87] But where a physician

[87] In Paul v. Insurance Co., 112 N. Y. 472, 20 N. E. Rep. 347, the policy was substantially like the one in question here, indemnifying against injuries caused by external, violent, and accidental means. The insured died from inhaling illuminating gas. He was stopping at a hotel in New York city. He was found dead in his bed, the room being filled with gas. When found the deceased lay on his bed like a man asleep, without any external or visible signs of injury upon his body. An action on the policy was sustained, and in disposing of the question whether the injuries were caused by external and violent means, the court said: "As to the point raised by the appellant that the death was not caused by external and violent means within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause. The cases collated on the respondent's brief sufficiently establish that as a proposition: Trew v. Insurance Co., 7 Jur., N. S., 878; Reynolds v. Insurance Co., 22 L. T., N. S., 820; McGlinchey v. Casualty Co., 14 Atl. Rep. 13. If, as held in the case last cited, death from inhaling poisonous gas is to be regarded as caused by external and violent means, upon the same principle death resulting from the accidental taking of poison must be regarded as resulting from external and violent means. Again, where a person is drowned, having been suffocated by the action of the water in the lungs, if a death in such case is to be regarded as caused or produced by external and violent means, as held in the cases heretofore cited, for the same reason a similar rule must be applied where death resulted as alleged in this case. Here the death arose from accidentally taking and drinking poison, and we are constrained to hold, when such is the case, the injury resulting in death may be regarded as received through violent means. If a person should receive a gunshot wound in the

prescribed a poison, and an overdose was taken by mistake, it was held that insurers were not liable as for death under such a clause as the above, such result being deemed consequent upon medical treatment.[88] So the liability of assurer may be limited by the express words of the policy, whereby death by poison is by design of assured or any other person.[89]

§ 2878. Character of Death, whether Accident or Disease Caused from Contact with "Bacilli," Putrid Matter, etc., Malignant Pustule—Inoculation of Virus—Blood Poisoning.—In an important case decided in 1890 in New York the question was considered at length whether death from malignant pustule was an accident or a disease,[90] and the

body resulting in death, it would be conceded that death ensued from violent and external means; for a like reason poison taken into the stomach producing death may also be treated as an external, violent means. Indeed, we are inclined to concur with what was said by the court of appeals of New York in the case last cited, 'that a death which is the result of accident, or is unnatural, imports an external and violent agency as the cause.' We have been cited to a few cases holding a different rule: Hill v. Insurance Co., 22 Hun (N. Y.), 187. This case was overruled by the later case of Paul v. Insurance Co., 112 N. Y. 472; 20 N. E. Rep. 347. Pollock v. Association, 102 Pa. St. 230 (this last case is also distinguished in Pickett v. Pacific Mut. L. Ins. Co., 144 Pa. St. 79) is a case sustaining the position of the defendant. But while we recognize the high ability of the court in which the case was decided we are not disposed to follow the rule there adopted. We think the rule established by the court of appeals of New York is better calculated to carry out the true intention of the parties where the contract of insurance was entered into, and one too more nearly in harmony with the current of authority bearing on the question. The judgment of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court for further proceedings in conformity to this opinion."

[88] Bayliss v. Accident Assoc., 102 Pa. St. 230; 6 Ins. L. J. 109.

[89] See Pollock v. Accident Assoc., 102 Pa. St. 230.

[90] Malignant pustule is also known as "charbon" or "anthrax," the terms being synonymous. It is also called "woolsorters' disease," being peculiar to people who handle wools and hides, such as tanners, butchers, and herdsmen, as well as to other people who are brought in contact therewith, and it has also been called an "epidemic." It is caused, according to the evidence in this case as stated by the court, "by the infliction upon the body of a certain kind of animal substance; contact with diseased or putrid animal matter. This acts by producing at the point of contact with this matter a papula,

court said: "There cannot be the slightest doubt that malignant pustule is regarded generally by those who have but the usual acquaintance with such matters as a disease. Every particle of testimony given by the doctors called by the plain-

something like a flea bite, which rapidly becomes a vesicle—a blister-like affair—and then a pustule; this is accompanied by a great deal of swelling in the parts immediately around it and a great deal of pain in the individual; the glands in the vicinity become infiltrated with blood and pus, and become dark red or even black in color; the neighboring glands become involved; then comes almost immediately or together with these signs a great prostration, and the patient dies in a short time, five to eight days generally, the extreme limits being from twenty-four hours to sixteen days; he dies of exhaustion. . . . . It may be communicated directly, that is, by the immediate contact of the individual with it; by his touching or handling it, and then bringing the matter in contact with the skin or thin mucous membrane; or it may be transported, as there are very many cases known, by insects, flies, or mosquitoes that have been feeding upon this, carrying it away and depositing it upon individuals." One witness also said that he had "seen it termed in one standard authority as an 'acute infectious disease.' He said that the special poison of the disease has been found to be a particular kind of bacteria, 'bacillus anthrax.' The following question was put to the witness, 'Is it not so that anthrax is an acute infectious malady, which breaks out commonly in an epizootic or enzootic manner, and is not unfrequently sporadic in herbivorous animals and swine, and is transmissible to a great number of other animals, as well as to mankind?' The answer was, 'Yes; I think that is correct.'" The witness further testified that malignant pustule differed only from diphtheria, smallpox, etc., in that it was a particularly poisonous animal matter originating from one particular germ. "It can be contracted through eating the flesh of animals subject to the disease; the bacillus is very small—so small that it may enter in the pores of the skin, and an abrasion of the skin is not necessary, but might quicken the result. The forming of the pustule upon the skin is the product of the poison." Another witness testified that the "contagion might be internal as well as external; taken through the mouth or through the nose, and it is generally considered as an acute infectious disease." Both these witnesses, "however, refused themselves to designate malignant pustule as a disease. Dr. Harris defined it as 'a pathological condition and succumbing of the body to the infliction of this particular poison.' Dr. Bailey says he considers it as a 'pathological condition following this particular inroad of this particular kind of bacilli.' We all know that 'pathology,' as used generally, means that part of medicine which explains the nature of diseases, their causes and symptoms. A 'pathological condition' means neither more or less than a diseased condition of the body."

tiff shows clearly to my mind that it is so regarded generally in the medical world." The main point of the decision, however, rests in the distinction made by the court, in the course of its opinion, that "the insured died from a disease attacking him subsequent to the issuing of the policy. He did not die from any accident, within the provision contained in the policy defining an accident," the provision being against death by external, violent, and accidental means.[91] A material factor affecting this decision is the provision that the benefits should "not extend to any death or disability which may be caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this certificate, or by poison in any manner or form." But with all due respect to the high standing and authority of this court, the case is subject to criticism, at least so far as it holds that the death was caused by disease, and the case is not in a line with the authorities. In making this criticism, however, we do not intend to be understood as saying that anthrax or malignant pustule is not a disease, for recent and high medical authorities consider it a disease.[92] But having in view the rules of construction and the doctrine of proximate cause, it is difficult to reconcile this decision with the rulings in other courts in cases involving analogous principles. The case in effect

[91] Bacon v. United States Mut. Acc. Assn., 123 N. Y. 304; 25 N. E. Rep. 399; reversing 44 Hun (N. Y.), 599; 3 N. Y. Supp. 237; 9 L. R. Ann. 617, per Peckham, J.; Ruger, C. J., and O'Brien, J., dissenting. The court distinguishes Paul v. Travelers' Ins. Co., 112 N. Y. 472, where the death was from gas inhaled, noted under next section. This last case, however, is approved in Healey v. Mutual Acc. Assn., 133 Ill. 556, quoted under preceding section. See Stedman v. United States Mut. Acc. Assn. (N. Y.), 9 L. R. Annot. 617.

[92] "An acute infectious disease caused by the bacillus anthracis": Osler's Pract. Med., ed. 1893, 156. "An infectious febrile disease of man and certain of the lower animals, chiefly horses and cattle": Foster's Ency. Med. Dict. (1892), "Anthrax." See Id., "Pustule." It is spoken of as a "disease" in Buck's Handbook of Med. Sciences, p. 237, et seq., "Anthrax." "Anthrax is an acute infectious bacteridian disease, occurring mostly in the herbivora and omnivora, but communicable to other mammals, including man, to birds, and even fishes": 1 Pepper's System of Medicine, ed. 1885, Article by James Law, F. R. C. V. S., p. 926.

separates the injury from the disease to the extent of holding that assured died from disease, while in reality the disease was but one link in the chain, and the contact with the putrid matter or bacilli was the external, violent, and accidental means directly causing the death. The disease was instantaneously caused by the contact or violence,[93] and so much a part and parcel of it that it could not fairly be considered a primary or supervening independent cause of death. It cannot be separated from the means producing it. It is a fair and reasonable presumption that the danger was unforeseen, and that the contact with that danger was without assured's foresight, expectation, design, or voluntary act. The exact manner in which assured was inflicted with the virus putrid matter or bacilli does not appear, but the jury found that the bacilli were implanted upon the lip of assured where the sore was some time within ninety days prior to his death. The putrid substance or bacilli reached the body by external means. It was unforeseen and without design, and therefore accidental. The contact of the virus with the lips implied also some degree of violence, as much so as gas in the atmosphere, as an external cause, is a violent agency. It will be seen from an examination of the authorities in the appended note[94] that this disease does not occur spontaneously in man;

[93] In stating the point as above we do not intend to rest the question upon lapse of time merely, but the fact that the disease was so closely connected with the violence makes it the more difficult to separate the causes and to hold that disease was the cause of death.

[94] "The disease does not occur spontaneously in man, but always results from infliction either through the skin," etc. There is also "external" and "internal anthrax": Osler's Pract. Med., ed. 1893, 157, 158. "Due to inoculation with the bacillus anthracis. When it principally affects the skin it is known as malignant pustule or malignant oedema": Foster's Ency. Med. Dict. (1892), "Anthrax." "Until quite recently, however, the form which originated as a local external affection was the only type recognized, while internal anthrax was confounded with a multitude of other affections": 1 Pepper's System of Medicine (1885), p. 926, Article by James Law, F. R. C. V. S. This same writer also says: "It is highly probable that it may be conveyed by the bite of a fly or mosquito, that surgical instruments occasionally convey anthrax, and in various other ways." So again: "Direct inoculation on a sore, by contact, by insects, by harness, by accidents, etc., is an undoubted method"; and he also says:

that it occurs by inoculation, and may be conveyed by the bite of a fly or by surgical instruments, etc. Suppose a surgeon accidentally cuts himself with a surgical instrument, which conveys the disease, and, as is the character of this disease death quickly ensues, could it not fairly be said that the accidental cutting was so far inseparable from the disease that it, and not the disease, was the proximate cause of death, and that death was by "external, accidental, and violent means," even though death by disease were excepted? And if the bacilli reaches the body externally, by being implanted upon the lips, is any different principle involved? It would seem not. The degree or force of the contact can make no difference as to the point of "violent" means, except that a greater degree of violence might be more apparent or more susceptible of proof than a less degree. The following decisions are in point: Thus, in an English case[95] the policy was against death accidentally occurring from material and external causes, as the direct and sole cause thereof, and it especially excepted death from hernia or other diseases, or cause "arising within the system of the assured before or at the time or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury," and assured died from a surgical operation to relieve hernia directly and solely caused by external violence, and such death was held not within the exception; but where a disease followed as a "secondary cause arising within the system," etc., the death was held within the exception, the preceding case being distinguished on the ground that the hernia was instantaneously caused by the injury, and it was part and par-

"The principal modes of infection may be considered as direct and mediate; among the direct are included infection from handling sick animals, their carcasses, their wool, hair, bristles, hides, fat, and guts. The inoculation of physicians, surgeons, and nurses from their patients, and the infection of men by the meat, milk, and cheese eaten, as attested modes of mediate infection may be cited. The inoculation by insects, mosquitoes, bluebottles, and other blood-suckers," etc: Id. 939.

[95] Fitton v. Accidental Death Ins. Co., 17 Com. B., N. S., 122; 34 L. J. Com. P. 28.

cel of the injury itself; the condition did not contain the word "secondary" preceding the word "cause."[96] Again, strictly speaking, the bacilli can hardly be deemed a "poison," so far as the facts of the case show, as it was taken into the system by external application, but even inhaling poisonous gas is regarded as caused by accidental and violent means. So also the accidental taking of poison and asphyxiation by the action of water are external, violent means.[97] Again, these conditions are construed, as a rule, favorably to the assured. The death, therefore, would seem to have been directly caused by external, violent, and accidental means. The dissenting opinion is entitled to weight, as being in accord with the principles and decisions of authority.[98] In another New York case, decided in 1891, in the supreme court, however, a policy insured against death by external, violent, and accidental means, with an exemption of liability in case of death "caused wholly or in part by bodily infirmities, or disease existing prior or subsequent to the date of the certificate," or in any case where the injury was not the sole and proximate cause of death. The deceased died from blood-poisoning, caused by receiving a wound and the inoculation at the same time of virus or matter discharged from a prior wound, which had been lanced about nine days prior to receiving the second wound. It was held that the inoculation was a part of the second accident, and the proximate and sole cause of death, notwithstanding the blood poisoning.[99] Again, in a Pennsylvania case, while the assured, who used to be a farmer, was pitching hay in the field of a relative whom he was visiting, the handle of the pitchfork slipped through his hands and

[96] Smith v. Accident Ins. Co., 5 L. R. Ex. 302; 39 L. J. Ex. 211, per Cleasley, B., Channell, B., and Martin, B.

[97] See Healey v. Mutual Acc. Assn., 133 Ill. 556, per Craig, J., quoted under preceding section.

[98] See dissenting opinion of O'Brien, J., and opinion of Craig, J., in Healey v. Mutual Acc. Assur., 133 Ill. 556, given under preceding section.

[99] Martin v. Equitable Acc. Assn., 61 Hun (N. Y.), 467; 41 N. Y. St. Rep. 77; 16 N. Y. Supp. 279. Examine as to proximate, etc., cause, United States Mut. Acc. Assn. v. Barry, 131 U. S. 111, 113, and c. lix, herein.

struck him in the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died, it was held that this was a case of death resulting from an injury occasioned by "accident," even though the policy stipulated against liability for death caused by natural disease and surgical operation.[100] And although a fall may have produced a condition designated as apoplexy, the death is nevertheless accidental, and not in consequence of disease;[101] or where a fall results in typhoid fever, even though the evidence be of death or disease, the verdict of death by accident will not be disturbed where there is sufficient evidence to support it.[102]

§ 2879. **Disease Causing Death "Directly or Jointly with such Accidental Injury."**—If the policy provides against liability in case of injuries accidentally occurring from material and external causes, such injury being the sole and direct cause of death, followed by an exception covering enumerated diseases, "whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury," the clause here given in quotations being in parentheses placed after the designation of diseases, they will be construed as pointing out the cases to which the exception will apply; and where one falls in a fit in front of a locomotive engine and is killed, yet although a fit is a form of disease, it is not a disease to which the words in the parentheses apply, nor is the death a death by disease, although the fit may have been the cause of assured's being placed in a position wherein he was killed, yet the accidental killing is the proximate sole cause of death; it is an independent cause intervening between the result and the falling into a fit.[103]

[100] North American L. etc. Ins. Co., v. Borroughs, 69 Pa. St. 43; 8 Am. Rep. 212.

[101] Accident Ins. Co. of North America v. Young (Can. S. C. 1892), 12 Can. L. T. 217. See Smith v. Accident Ins. Co., 5 L. R. Ex. 302; 39 L. J. Ex. 211, noted above under this section.

[102] Standard L. etc. Co. v. Thomas (Ky. 1891), 17 S. W. Rep. 275.

[103] Lawrence v. Accidental Ins. Co., L. R. 7 Q. B. D. 216; Winspear v. Accident Ins. Co., 6 Q. B. 42.

§ 2880. Where Death is not from Accident but by Disease.—The plaintiff was master of a vessel about to proceed on a foreign voyage, and was insured against any personal injury from or by reason of or in consequence of any accident which might happen to him upon any ocean, sea, river, or lake. The assured, while on board his ship in the discharge of his duty in the Cochin river, off the coast of India, was struck down by sunstroke, from which he died the same day, and it was held not death by accident.[104] And where the post mortem showed that the heart and brain was generally diseased, and that the fall was caused thereby, and no external cause for the fall was shown to exist, the consequent death was held to result from disease, even though there was nothing in the general external appearance of assured to indicate disease.[105] If an existing but dormant disorder or disease is brought into activity by the accident, and death is caused wholly or in part by the disease, a question might fairly arise whether the accident was the proximate cause of death; the injury could not be held the sole cause of death within a stipulation for liability only for injuries or accidents which are the sole proximate cause of death.[106] And where assured accidentally fell, and a few weeks thereafter a disease appeared from which the assured had suffered in prior years, no recovery as for death by accident was permitted.[107]

[104] "Disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences cannot, we think, properly be said to be accidental; unless at all events the exposure is itself brought about by circumstances which may give it the character of accident. . . . . In the present instance the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable. . . . . We think . . . . that his death must be considered as having arisen from a natural cause": Sinclair v. Maritime Pass. Assur. Co., 3 El. & B. 478; 2 Big. L. & A. Ins. Rep., per Cockburn, C. J.; Dozier v. Fidelity & Casualty Co., 46 Fed. Rep. 446.

[105] Sharpe v. Commercial Travelers' Mut. Acc. Assn. of America, 139 Ind. 92; 37 N. E. Rep. 353.

[106] See United States Mut. Acc. Assn. v. Barry, 131 U. S. 113.

[107] McKechine's Trust v. Scottish Acc. Ins. Co., Lim. (S. C. Sess.

So where assured dies from pneumonia, without any evidence of any accident or injury, it is death by disease.[108]

§ 2881. Asphyxiation Caused by the Action of Water or Inhaling Gases.[109]—Death from the action of water causing asphyxiation is death by external violence, and is within the clause "external, violent, and accidental means." Thus, where the plaintiff was last seen alive walking toward a railroad bridge crossing the water, which was used by pedestrians to cross the stream, and the body of the deceased was found in the water not far from the bridge a few days thereafter, and there was a wound upon his head and a break in the corresponding part of the hat, it was held that the death was accidental.[110] So the drowning is the sole proximate cause of death, and the death is accidental, although assured falls into the water owing to a temporary trouble, but an unusual and uncommon one with him. It makes no difference what is the cause of falling into the water, or that being in the water he has cramps or other temporary and unusual trouble, which prevents swimming, unless death would have resulted independently of the action or presence of the water, and, in the absence of evidence of death from natural causes, drowning must be presumed, and slight evidence tending to show defective action of the heart, and that deceased suffered from dizziness caused thereby, and the autopsy failing to show any structural defect, and the brain and other vital organs being found in a healthy, normal condition, a verdict for the plaintiff will not be disturbed.[111] In a federal case assured was found dead in the middle of a stream near by which he was camping

Cas. 1889), 17 Sess. Cas. 6. But see Freeman v. Mercantile Mut. Acc. Assn., 156 Mass. 351; 30 N. E. Rep. 1013.

[108] Equitable Mut. Acc. Assn. v. McCluskey, 1 Colo. App. 473; 29 Pac. Rep. 383.

[109] See secs. 2620, 2621, herein.

[110] Mallory v. Travelers' Ins. Co., 47 N. Y. 52; followed in Mallory v. Travelers' Ins. Co., 54 N. Y. 651; 7 Am. Rep. 410.

[111] Manufacturers' Acc. Indem. Co. v. Dorgan, 7 U. S. C. C. A. 581; 58 Fed. Rep. 945. See Trew v. Railway Pass. Assur. Co., 6 Hurl. & N. 840; 30 L. J. Ex. 317, and argument of Crampton, J.

with others, and a short time before he was found near by said spot trouting; the bank was about eighteen inches high; there were small stones in the stream at that place and about six inches of water; there were bruises upon his forehead and he was lying face downward, and the jury found for the plaintiff, the court refusing to disturb the finding.[112] So also in other cases where the assured has been found drowned with bruises on his body, or under circumstances indicating asphyxiation by the action of water, and no evidence that death would have resulted from natural causes or diseases without the presence of water, or in the absence of positive proof as to how the drowning was caused, or that the drowning was caused by a boat overturning, plaintiff has been permitted to recover. So also where the injury, being produced by accident and not causing death, caused deceased to fall into the water, where he was drowned, the death was accidental.[113] But in a federal case it appeared that assured was subject to epileptic fits, and the testimony showed that the entrance into the plunge bath, its temperature being about one hundred degrees, would have resulted in an attack of such fits to one in assured's condition. He was standing almost upright when found, but had sustained bruises on his head and between his eyes. The fall or blow which occasioned these, however, in themselves caused death, and the court held that this was not a death by external, violent, and accidental means.[114] Death by the inhalation of poisonous or irrespirable gases, without design, intent, or expectation on the part of assured, is death by external, violent, and accidental means. The gas is external: it is not inhaled voluntarily. And where assured died while asleep in a room by inhaling illuminating gas, the case was

[112] Manufacturers' Acc. Indem. Co. v. Dorgan, 7 U. S. C. C. A. 581; 16 U. S. App. 290; 58 Fed. Rep. 945.

[113] Trew v. Railway Pass. Assur. Co., 6 Hurl. & N. 839; 30 L. J. Ex. 317; reversing 5 Hurl. & N. 210; 6 Jur., N. S., 799; Boyd v. Refuge Assur. Co., Lim., 17 Sess. Cas. (S. C., 4th ser., 955; Tucker v. Mutual B. L. Co., 121 N. Y. 718; 50 Hun (N. Y.), 50; 4 N. Y. Supp. 505; Winspear v. Accident Ins. Co., 6 Q. B. D. 42; Reynolds v. Accidental Ins. Co., 22 L. T., N. S., 820.

[114] Tennant v. Travelers' Ins. Co., 31 Fed. Rep. 322.

compared to that where assured had been asleep in a room into which a large quantity of water flowed by the breaking of a watermain, and, in consequence thereof, he had been drowned, it being said that there is no difference in principle if the death, instead of being caused by water, which is visible, is caused by gas, which is invisible.[115] And the case of death by inhaling gas is held in principle, so far as being caused by external, violent means is concerned, to be analogous not only to suffocation by the action of water in the lungs, but also to the case of accidental taking of poison.[116] So death by suffocation by poisonous gases at the bottom of a well by the deceased, being a mechanic, who had gone there to make repairs, that being in the line of his business or occupation, is accidental.[117] The policy may by its terms, however, exempt the insurer from liability in case of asphyxiation of this character, but even in such cases the arguments of the courts expressly or impliedly concede the rule that it is of course subject to the exception.[118]

§ 2882. Injury or Death Inflicted through Felonious Act of Another or Inflicted by Wrongdoer.—If a person acting feloniously inflicts an injury upon another or causes his death, such injury or death is within the clause "external, violent, and accidental means," whether the injury to or death of that particular person is or is not intended, and the same is true of an injury or death inflicted upon another by

[115] Bacon v. United States Mut. Acc. Assn., 123 N. Y. 304, per Peckham, J.; remarks upon the case of Paul v. Travelers' Ins. Co., 112 N. Y. 472. This last case approved as to the principle asserted and followed in Healey v. Mut. Acc. Assn., 133 Ill. 556-64; 25 N. E. Rep. 52; 23 Am. St. Rep. 637, per Craig, J. It is commented upon in Richardson v. Travelers' Ins. Co., 46 Fed. Rep. 843, per Blodgett, J., and it overrules Hill v. Hartford Acc. Ins. Co., 22 Hun (N. Y.), 187.

[116] Healey v. Mutual Acc. Assn., 133 Ill. 556; 25 N. E. Rep. 52; 23 Am. St. Rep. 637, per Craig, J. And see dissenting opinion of O'Brien, J., in Bacon v. United States Mut. Acc. Assn., 123 N. Y. 304.

[117] Pickett v. Pacific Mut. L. Ins. Co., 144 Pa. St. 79; 22 Atl. Rep. 871.

[118] See Menneilly v. Employers' Liability Assur. Co., 148 N. Y. 596; 54 N. Y. St. Rep. 780; 25 N. Y. Supp. 230; United States Acc. Assn. v. Newman, 84 Va. 52.

a wrongdoer. Thus, if a man throws a train of cars off the track, whereby the assured is injured or killed, this is as much an accident, so far as the person injured or killed is concerned, as if the cause of derailment proceeded from some other source; it is effected by external, violent, and accidental means, and is unforeseen, unexpected, and without design of the injured or killed party. The fact that an injury was intentionally inflicted by an assailant or wrongdoer, or because a desperado waylays, assails, and kills the assured, does not of itself make it the less accident. Absence of intent on the part of the person inflicting the injury is not essential, and a person waylaid and killed by robbers, whether they originally intended the killing or not, or if the killing was the result and in furtherance of the original felonious act, is force, violence, accidental, occurring without the agency or design of assured.[119] So an insurance against death by external, violent, and accidental means covers death by assassination, even though the policy provides against liability of assurer in case of intentional injuries inflicted by assured or another,[120] and death by murder is, so it is held, within such a clause.[120a] So death does not result from the unlawful act of the assured, if killed by an officer instructed to arrest him as a deserter, unless doing an unlawful act at the time.[121] So a verdict for assured, who died by a bullet penetrating his heart, there being no evidence of suicide, establishes the fact of death by external, violent, and accidental means.[122] And if a person receives a pistol shot without fault or wrong on his part in defense

[119] Phelan v. Travelers' Ins. Co., 38 Mo. 640; Ripley v. Railway Pass. Assur. Co., 2 Big. L. & A. Ins. Rep. 738, and opinion of Withers, J.; 16 Wall. (U. S.) 336; Insurance Co. v. Bennett, 90 Tenn. 256; Supreme Council of Order of Chosen Friends v. Garrigus, 104 Ind. 140; 54 Am. Rep. 298; Bostwick v. Stiles, 35 Conn. 198; Hutchcraft v. Travelers' Ins. Co., 87 Ky. 300; 12 Am. St. Rep. 484; 8 S. W. Rep. 570; 25 Am. L. Reg. 42.

[120] Hutchcraft v. Travelers' Ins. Co., 87 Ky. 300; 12 Am. St. Rep. 484; 28 Am. L. Reg. 42; 8 S. W. 570.

[120a] Insurance Co. v. Bennett, 90 Tenn. 256.

[121] Utter v. Travelers' Ins. Co., 65 Mich. 545; 8 Am. St. Rep. 913.

[122] Warner v. United States Mut. Acc. Assn., 8 Utah, 431; 32 Pac. Rep. 696.

against adversaries, assailants, or wrongdoers, the assured not intentionally co-operating in the affray, it is not a sufficient defense to say that the injury was willfully and intentionally inflicted by another, for this makes it none the less an accident.[123] If assured is intentionally shot and killed by another, yet if he has done nothing to provoke the shooting, it is accidental.[124] Where a life policy does not contain a provision in terms against a claim under the policy, if the death was caused by intentional injury inflicted by the insured or any other person, but contains merely a provision that the policy only covers injuries effected through "accidental means," an injury not anticipated and not naturally to be expected by the insured, though intentionally inflicted by another, is an accidental injury within the meaning of the contract.[125] If a person is insured against death or injury from "external, violent, and accidental means," and the policy provides that the insurance does not "extend to or cover intentional injuries inflicted by the insured or any other person," the exception refers only to non-fatal injuries, and if such assured is unexpectedly shot by another without cause or provocation, the company is liable.[126] Special provisions are inserted in policies intended to provide against liability in cases of the above character.[127] A stipulation that the insurer shall not be responsible if the death or injury may have been caused by intentional injuries inflicted by insured or by any other person refers to intention on the part of a third person inflicting the injury, without regard to whether the insured drew a brawl upon himself or intentionally engaged therein.[128] If it is stipulated that the insurance shall not cover any cause of death unless the claimant under the policy shall

[123] Supreme Council of Order of Chosen Friends v. Garrigus, 104 Ind. 140; 54 Am. Rep. 298.

[124] Jones v. United States Mut. Acc. Assn. (Iowa, 1895), 61 N. W. Rep. 485.

[125] Insurance Co. v. Bennett, 90 Tenn. 256; 25 Am. St. Rep. 683.

[126] American Acc. Co. v. Carson (Ky. C. A. 1896), 36 S. W. Rep. 169.

[127] See chapter on excepted risks and losses, life, and accident.

[128] Fischer v. Travelers' Ins. Co., 77 Cal. 246.

establish by direct and positive proof that the death was caused by external violence and accidental means, and was not the result of design, either on the part of insured or of any other person, such stipulation merely states as a condition that the death shall not be caused by the act of one whose design was to cause death by the act, and does not include every case where a blow not intended to kill unfortunately and undesignedly produces death.[129]

§ 2883. Internal Injury—Voluntary Act for Convenience, Pleasure, or in Daily Routine Duties Unaccompanied by Extraneous Accidental Cause — Rupture—Strains, etc.—Two opposing rules are deducible from the decisions upon this point. Thus, if internal injury results to assured in doing a voluntary act for his convenience or pleasure, or in his daily routine duties, he being induced thereto by no peril nor justifiable or forcible necessity, but does what he intends to do in the manner intended, using the means he intended to use in the free exercise of his will and choice, and the act is unaccompanied by any unforeseen, extraneous, accidental cause, such internal injury is held not to be by "violent accidental means"; if death ensues, it is not death by "when accidental means." Thus, a rupture caused by jumping from a train and running to accomplish a business purpose, there being no stumbling, slipping, falling, or striking any unseen object, no meeting with any obstacle, and the muscles of the walls of the abdomen giving away because of the unusual strain to which they had been voluntarily put by the assured, and there being no justifying necessity, no peril from which assured desired to escape, is held not to be "violent and accidental means."[130] So in a case where assured's colon was displaced and the bowels slipped in front of the liver as he was putting on his stockings upon getting out of bed, and death ensued owing to distension and pressure upon the heart it was declared not a death resulting from external, violent,

[129] Richards v. Travelers' Ins. Co., 89 Cal. 170.

[130] Southard v. Railway Pass. Assur. Co., 34 Conn. 574, per Shipman, J.

and accidental means. The court, however, seems to have conceived the idea that the act of pulling on the stockings was the means, rather than that the fact that the displacement of the colon was the means of death.[131] So where a person voluntarily uses Indian clubs in the ordinary way, without any unforeseen, unusual circumstance attending such use, and without any involuntary movement of the body being occasioned, an injury or rupture sustained thereby is said not to be caused by accidental means, but if the injury or rupture is caused by an involuntary unforeseen movement of the body in exercising the clubs, which brings about or causes such injury in connection with their use, or if some unforeseen, unexpected circumstance is the cause of a strain or injury consequent upon such involuntary movement, then the injury is accidental.[132] Again, where the insured dislocated the cartilage of his knee in stooping to pick up a marble, it was held an injury sustained by violent, accidental, external, visible means, inasmuch as the word "external" must be distinguished from an internal cause of injury, such as disease, the policy containing a clause exempting the assurer from liability in cases of disease, etc.[133] In another case of internal injury occasioned by the jar produced by jumping from a platform a few feet high, and death ensued shortly thereafter, and it appeared that others who jumped at the same place and time received no injury, the court instructed the jury that if an internal injury was received which in direct cause produced duodenitis and thereby caused death, and no other independent cause supervened, and no dormant disorder or disease was brought into activity by such act of assured, then the injury was the proximate cause of death, which instructions were approved, and the plaintiff recovered as for death resulting from injury through "external, violent, and acci-

[131] Clidero v. Scottish Acc. Ins. Co., Lim. (Scot. Ct. Sess. 1892), 29 Scot. L. Rep. 303.

[132] McCarthy v. Travelers' Ins. Co., 8 Biss. (C. C.) 362; 8 Ins. L. J. 20.

[133] Hamlyn v. Crown Acc. Ins. Co., Lim. (Eng. C. A. Q. B. D. 1893), 1 L. R. Q. B. D. 750.

dental means."[134] So where assured in the course of his business sustained an injury to his spine by lifting, it was held an accident from an external and natural cause operating upon the body.[135] One principle underlying and applicable to the above cases is apparent from a case already noted, where the deceased in the discharge of his ordinary duties, being exposed to the rays of the sun in a tropical climate, was subjected to sunstroke, the sunstroke and death being held to be the direct effect of a known natural cause ordinarily very likely to occur.[136]

§ **2884. Same Subject—Conclusion.**—It is extremely difficult, in view of the conflicting decisions and various provisions of policies, to state what should be the true rule in this class of cases. There must have been some violence in all the above cases, and the degree of violence can make no difference. The injuries as a result of assured's acts were unforeseen, unexpected, and without design on his part; they were not a result naturally and ordinarily following his acts, but an unusual result attending the performance of said acts. If a man swings Indian clubs in exactly the way he intends to do, purposing thereby to exercise muscles, and strains those particular muscles, such act is voluntary. The straining is a not unusual occurrence, is reasonably to be foreseen, and not unfrequently results, but this is not the case under the other decisions, as in none of them was the injury one which could be brought within such an illustration, and even in the Indian club case the court notes that involuntary movements in connection with the use of the clubs would make a resulting injury accidental. Therefore, it can hardly be said that the act of the assured was voluntary, and that he was doing exactly what he intended to do when in some involuntary, unusual, unforeseen way an injury happens which is not the ordinary natural result of his acts. Again, these policies are lib-

[134] United States Mut. Acc. Assn. v. Barry, 131 U. S. 100.

[135] Martin v. Travelers' Ins. Co., 1 Fost. & F. 505.

[136] Sinclair v. Maritime Pass. Assur. Co., 3 El. & E. 478; 3 L. J. Q. B.

erally construed in favor of assured, so far as that may be done without violence to the terms of the contract, and the contract should be examined to ascertain what is meant by "external injuries," whether upon the face of the contract internal injuries are clearly excluded, and whether "external" is to be taken in contradistinction to internal causes of injury, as where injuries arising from disease are excepted. So if death ensues, the efficient proximate cause of loss must be considered not necessarily the nearest, but the efficient adequate cause being found, that will be deemed the true cause, without going further. It should also be determined whether any independent supervening cause exists which may exclude consideration of a cause further removed. It would seem upon reason and principle that much weight should be given those of the above cases which hold injuries of this class, or death which directly and proximately results therefrom, to be an injury or death by external, violent, and accidental means.

§ **2885. Other Cases of External, Violent, and Accidental Means.**—As will be observed, a large number of the cases under the preceding sections are, in addition to the points indicated by the heading, also within the clause "external, violent, and accidental means." This clause is also held to cover the following cases: Thus, where assured was taken sick and died within an hour, owing either to fright or strain caused by exertions in attempting to restrain a runaway horse, even though the carriage was not upset nor came in contact with anything, and the horse was brought under control;[137] death of a railroad employee by a train while engaged in the performance of a duty he was ordered to perform, and at a place where he was directed to work;[138] stumbling and falling against a locomotive engine;[139] choking to death while

[137] McGlinchey v. Fidelity & Casualty Co., 80 Md. 251; 6 Am. St. Rep. 190; 14 Atl. Rep. 13; 6 N. E. Rep. 450.

[138] Freeman v. Travelers' Ins. Co. of Hartford, 144 Mass. 572; 12 N. E. Rep. 372.

[139] Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201; 44 Alb. L. J. 304; 9 S. Rep. 869.

attempting to swallow a piece of beefsteak;[140] drowning by the capsizing of a boat.[141] Unnatural death, the result of accident of any kind, imports an external and violent agency as the cause within the meaning of an insurance policy limiting recovery to death caused through "external, violent, and accidental means." [142] If a policy stipulates that it "does not insure against death or disablement . . . . from accidents that shall bear no external and visible marks," such provision, although not clear, would seem to indicate that its purpose is that there should be some external or visible evidence which evidences that the death or injury was accidental, and there is sufficient external or visible evidence that death is accidental to exclude it from the exception, where insured is admitted to have died from involuntarily and accidentally breathing illuminating gas, and although there are no visible marks upon the body, yet when artificial respiration is produced illuminating gas emanates therefrom to the perception of the person producing such respiration, and upon entering the room it is perceived to be full of gas and gas is then escaping, and an inspection of the body shows life extinct.[143] Where insured was crossing a prairie and his wagon broke, and, being unable to ride, the driver took one of the horses and rode for assistance, but on his return insured was found frozen to death, it was held that the insurer was liable under a provision as to death or disability by external, violent, and accidental means, although it was also stipulated against liability in consequence of death from exposure to any obvious or unnecessary danger.[144] If the evidence leaves it doubtful whether the death of insured was caused by a fall or by a

[140] American Acc. Co. of Louisville v. Reigart, 94 Ky. 547; 23 Ins. L. J. 148; 23 S. W. Rep. 191; 42 Am. St. Rep. 374.

[141] Tucker v. Mutual B. L. Co. of Hartford, 50 Hun (N. Y.), 50; 4 N. Y. Supp. 505.

[142] American Acc. Co. v. Reigart, 94 Ky. 547; 42 Am. St. Rep. 374.

[143] Menneily v. Employers' Liability Assur. Co., 148 N. Y. 596, 602, per Martin, J.; reversing 72 Hun (N. Y.), 477; 54 N. Y. St. Rep. 780.

[144] Northwest Travelers' Assn. v. London etc. Acc. Co. (2 B. D. 1894), 15 Can. L. T. 19; 50 Alb. L. J. 421.

blow struck by a third person, in either case the death is caused by accidental means" within the clause against injuries by "external, violent, or accidental means."[145] Bodily injuries sustained through violent, external, and accidental means covers hanging by a mob, and is an accident.[146]

[145] Richards v. Travelers' Ins. Co., 89 Cal. 170.
[146] Fidelity & Casualty Co. v. Johnson, 72 Miss. 333; 17 S. Rep. 2.

CHAPTER LXI.

ABANDONMENT AND TOTAL LOSS—MARINE RISKS.

§ 2892. Abandonment and constructive total loss—Generally.
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§ 2947. Total cannot be changed into a partial loss by acts of assurer or agent after abandonment.
§ 2948. Recovery or restoration of property or indemnity received before abandonment.

§ 2892. Abandonment and Constructive Total Loss—Generally.—The purpose of an abandonment is to make that a total loss which would not otherwise be one.[1] The term "abandonment" implies that there is something surviving, some part interest or claim existing which may be abandoned, and that the underwriter, upon the transfer or cession by assured of his rights, title, and interest in the thing insured, shall pay the amount insured, saving to himself such recompense as he can out of the effects abandoned. The principle of indemnity requires assured to yield up or cede to the underwriter his whole right, title, and interest in the subject or thing insured, so far as that interest is covered by the policy or contract, for the benefit of the underwriter, and by virtue thereof the latter stands in assured's place, and becomes legally entitled to what may be saved to the extent of said interest within the policy. There are, however, certain obligations imposed upon the underwriter which will be noted hereafter, as will also be noted the point of vesting of the property in the underwriter. There may be a total loss where there is such damage to the property insured as that it has little or no value to the assured, even though the subject itself specifically remains; or by a peril insured against the voyage may be so broken up or its objects frustrated by assured's being deprived of possession and control of the property, that it is not worth while for assured to pursue the adventure; or the recovery of the property may involve such a large expenditure, compared with its value, as not to warrant assured (having in view the rule in this country as distinguished from that in England), as a prudent man, to undertake the expense. In such cases assured may elect to abandon and cede his rights and interests to the underwriter.[2] "Abandonment is the act by which, after con-

[1] Gracie v. New York Ins. Co., 8 Johns. (N. Y.) 237.

[2] Roux v. Salvador, 3 Bing. N. C. 286, per Lord Abinger; Marcardier v. Chesapeake Ins. Co., 8 Cranch (U. S.), 39; 2 Marshall on In-

structive total loss, a person by contract or marine insurance declares to the insurer that he relinquishes to him his interest in the thing insured." [3] The doctrine of constructive total loss does not imply that the assured is to receive any more than a full indemnity in any case, and as a matter of justice to the insurer, and for his benefit, the doctrine of abandonment was intended to prevent assured's recovering more than a full indemnity. Abandonment is a technical doctrine, and is supposed to have been originally introduced by merchants, perhaps by way of stipulations in the contract, and afterward adopted as a part of the law of marine insurance, and it was a question at one time whether the practice of abandoning was not carried too far and should not be abridged, and it was said that the owners should not abandon in any case where the property still existed, and it is also said that the doctrine "at first sight seems a mere encroachment of the judges." [4] The right to abandon may, however, be affected by the stipu-

surance, ed. 1810, 486, 559; Emerigon on Insurance, Meredith's ed. 1850, c. xvii, sec. 1, et seq., p. 664, et seq.; 3 Kent's Commentaries, 5th ed., 321.

[3] Deering's Annot. Civ. Code, sec. 2716.

[4] Castellain v. Preston, L. R. 11 Q. B. D. 380, per Brett, L. J.; Goss v. Withers, 683, 697, per Lord Mansfield; 2 Marshall on Insurance, ed. 1810, 559, et seq.; citing Pringle v. Hartly, 3 Atk. 195; Mitchell v. Edie, 1 Term Rep. 615, per Buller. See Emerigon on Insurance, Meredith's ed. 1850, c. xvii, sec. 1, pp. 666, 667. "The object of abandonment is a fair indemnity to assured which he could not otherwise obtain in many cases of constructive total loss, since it would otherwise be necessary to put it to the jury to make a conjectural estimate of the value of the salvage": 2 Phillips on Insurance, 3d ed., 235, sec. 1492. Putnam, J., thinks that abandonment is a clear departure from the principles of indemnity in Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303. "The object of insurance is to procure to the insured indemnity for the losses and damages that he suffers, but to obtain this indemnity it is not necessary, according to the law of nations, that the assured should abdicate his property in the subject, although, if the thing perishes, it perishes for account of the insurers. It suffices, according to the law of nations, that the insurers pay the indemnity for the loss or damage without their being obliged to become proprietors of a thing which did not belong to them; for insurance is not in its nature a means of acquiring the agreements which it was the custom to stipulate on. This subject no doubt gave rise to the positive rules that now exist": Emerigon on Insurance, Meredith's ed. 1850, c. xvii, sec. 1, p. 665, et seq.

lations of the policy; as in case of a warranty not to abandon, in case of capture or detention until six months after notice thereof to insurers, or not to abandon in case of capture until condemned, or the policy may expressly exclude the "benefit of abandonment."[5] If assured covenants not to abandon within a certain time, he cannot recover for a total loss within the time, especially if his vessel arrives safe, though she may have been repaired at the expense of assured.[6] Although the vessel be stranded, yet there being no proof that she could not have been rescued and repaired, a total loss cannot be claimed.[7]

§ 2893. **Abandonment and Total Loss in Case of Freight—Generally.**—A constructive or technical total loss of freight and a right to abandon may arise from a constructive total loss on the ship or ship and cargo, and this is true in case of the vessel's becoming a wreck or innavigable, and it is said that the same peril, and to the same extent, ought to authorize a recovery on a policy on freight as on the ship. In considering the question of constructive total loss and abandonment of freight, reference should be had to the distinction between the two kinds of freight in marine insurances.[8]

[5] See Ogden v. Columbian Ins. Co., 10 Johns. (N. Y.) 273; Barney v. Maryland Ins. Co., 5 Har. & J. (Md.) 139; Adams v. McKenzie, 32 L. J. C. P. 92; De Peau v. Russell, 1 Brev. (S. C.) 441; 21 Am. Dec. 616. In this connection Mr. Phillips, criticising the case of Barney v. Maryland Ins. Co., says: "Under a stipulation not to abandon, the right of the assured to recover for a constructive total loss does not accrue until the hope of recovering the subject insured is desperate, or the chance of such recovery is indefinitely postponed": 2 Phillips on Insurance, 3d ed., 248, sec. 1507.

[6] Ritchie v. United States Ins. Co., 5 Serg. & R. (Pa.) 501.

[7] Phœnix Ins. Co. v. McGhee, 18 Supr. Ct. Rep. (Can.) 61.

[8] Herbet v. Hallett, 3 Johns. Cas. (N. Y.) 93, per Kent, C. J.; Idle v. Royal Exch. Assur. Co., 3 Moore, 115; 8 Taunt, 755; 3 Brod. & B. 151, n.; Ogden v. General Mut. Ins. Co., 2 Duer (N. Y.), 204; Coolidge v. Gloucester Ins. Co., 15 Mass. 341; Benson v. Chapman, 6 Man. & G. 810, per Tindal, C. J.; Charleston Ins. Co. v. Corner, 2 Gill (Md.), 410; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45; Whitney v. New York Fire Ins. Co., 18 Johns. (N. Y.) 208; Parmeter v. Todhunter, 1 Camp. 541; Callender v. Insurance Co. of North America, 5 Binn. (Pa.) 525; Dunning v. Merchants' M. Ins. Co., 57 Me. 108. See sec-

The above general statement is subject to the qualification that the question whether an abandonment is necessary or can be made may depend upon the question of an absolute total loss of vessel and cargo, or either, as well also upon the fact whether in case of the insurance of the freight of a cargo there is a justifiable sale of the cargo, or the goods should have been detained, repairs made to the vessel, and the cargo forwarded therein, or whether it should have been forwarded in another vessel, and also upon the fact whether freight pro rata itineris has been earned, or the expense of sending on the cargo by another vessel should have been incurred.[9] If the cargo is so injured by the perils insured against as to become wholly worthless and incapable of being carried with safety to the vessel and the remaining cargo, or to the health or lives of the crew, and ceases to exist as goods of that character which they were as insured, and are thrown overboard, there is a total loss of freight, and this is true though the ship be not left able to continue the voyage.[10] It is provided, however, by the California code that "freightage cannot in any case be abandoned unless the ship is also abandoned."[11] But in so far as this provision conflicts with the doctrine above

tions herein as to distinction between the two kinds of freight. See Riley v. Hartford Ins. Co., 2 Conn. 368, per Hosmer, J.; Barclay v. Sterling, 5 Maule & S. 6.

[9] Hugg v. Augusta Ins. & B. Co., 7 How. (U. S.) 609; Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.), per Yeates, J.; Idle v. Royal Exch. Assur. Co., 3 Brod. & B. 151, n.; 8 Taunt. 755; 3 Moore, 115; Ogden v. Gail Mut. Ins. Co., 12 Duer (N. Y.), 204; Vlierboon v. Chapman, 13 Mees. & W. 230; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45; 7 Cow. (N. Y.) 564, per Walworth, Ch.; Bradhurst v. Col. Ins. Co., 9 Johns. (N. Y.) 17, per Kent. C. J.; Gorder v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 267; Parmeter v. Todhunter, 1 Camp. 541; Center v. American Ins. Co., 7 Cow. (N. Y.) 364; Roselto v. Gurney, 11 Com. B. 176; Roux v. Salvador, 3 Bing. N. C. 266; Willard v. Millers' etc. Ins. Co., 24 Mo. 561; Green v. Royal Exch. Assur. Co., 6 Taunt. 66. Examine secs. 2915, 2917, 2918, 2931, herein, as to right to abandon freight when vessel is abandoned.

[10] Jordan v. Warren Ins. Co., 1 Story (C. C.) 342; Parsons v. Manufacturers' Ins. Co., 16 Gray (82 Mass.), 463; Whitney v. New York F. Ins. Co., 18 Johns. (N. Y.) 208; Williams v. Kennebec Mut. Ins. Co., 31 Me. 455; Hugg v. Augusta Ins. & B. Co., 7 How. (U. S.) 609.

[11] Deering's Annot. Civ. Code Cal., sec. 2717.

just stated, it is peculiar to the code. It may be generally stated that "the underwriters are liable for freight" as a total loss when there is a total destruction in specie of the cargo.[12] So the insurer on freight is liable where the goods are destroyed by a peril of the sea and never reach the port of delivery, and where goods are carried in parcels, boxes, or sacks, and are washed out by said perils, this is a loss of freight.[13] Defendants were insurers upon a valued policy of the plaintiff's cotton which was shipped in the same vessel with cotton belonging to other owners. The vessel was shipwrecked upon the voyage and part of the cargo lost, and the remainder variously damaged and the marks destroyed, so that only a small part of the portion shipped by the plaintiff could be identified. The defendants paid for the part identified as for a partial loss, but claimed a total loss with salvage as to the remainder. It was held that as to the remainder also they were liable as for a partial loss.[14]

§ 2894. Distinction between Absolute and Constructive Total Loss—Absolute Total Loss—Generally.—Although if the subject insured be totally destroyed and annihilated it is an absolute or actual total loss, as distinguished from a constructive total loss, nevertheless this is not the only distinction between these two kinds of losses; for it is not necessary, to constitute an absolute total loss, that there should be an absolute destruction, or annihilation of the thing insured, and of every part and parcel thereof. The property may have become totally wrecked, have perished, and have ceased to exist as property of that kind; it may be saved in fragmentary parts, or in several, distinct, entire parts, but nevertheless such parts may not be in any condition capable of any use, or capable of reconstruction into a semblance of the thing insured, except possibly at an unwarranted expense exceeding the value of the property. This is illustrated by the case where nothing but the pieces of the entire ship come to land as parts of a

[12] Ridyard v. Phillips, 4 Blatchf. (C. C.) 443.
[13] De Wolf v. State Mut. F. & M. Ins. Co., 6 Duer (N. Y.), 191.
[14] Saale v. Sun etc. Ins. Co., 3 Rob. (N. Y.) 602.

wreck, the planks not even holding together, so that there is any shape, form, or semblance of a vessel as a vessel; or where distinct parts of insured machinery are recovered, but the pieces cannot be delivered as constituting that particular machinery capable of use for the purposes intended. Thus, it is said "when the ship in the course of her voyage and by the agency of the perils insured against becomes an absolute wreck, when she has broken in pieces and dismembered so that her planks and apparel are scattered on the sea, this is a case of an absolute total loss on the ship, though the whole or greater part of the fragments may reach the shore as a wreck. In such cases it is quite clear that the ship as a ship is totally destroyed; the ship has perished but the wreck remains." So in case of the machinery above cited it is said: "If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as a part of the machine—had lost it so entirely that it would cost as much to buy a new piece just like it as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use nor could be applied to any use connected with the machine of which it was a piece without more expense on it than it originally cost, then there was no part of the machinery saved, however much of rusty iron may have been taken from the wreck." Again, if the property insured has become so stranded, by reason of the perils insured against, that neither the assured or the underwriter are able to ever procure its arrival, this is an absolute total loss. So the ship may become lost absolutely to the assured in case of an adverse and legal transfer of his right of property and possession under decree and sale by a court of competent jurisdiction consequent upon a sea peril; as in case of a subsequent sale of a vessel derelict taken possession of by salvors, or in case of capture and condemnation, and this although the ship may be capable of repairs, or may not even need repairs. In cases of absolute total loss, the insurer is liable without abandonment, as noted elsewhere.[15] Inasmuch as certain policies

[15] Burt v. Brewers' etc. Ins. Co., 16 N. Y. Supr. Ct. 383; 9 Hun (N. Y.), 383; 78 N. Y. 400, per Talcot, J.; Carr v. Providence-Washington

provide against "actual total loss only," the construction given to these words should be considered in connection with the meaning given to the words "absolute total loss." This point has been considered elsewhere, and we refer thereto.[16] Strictly speaking, total annihilation or absolute physical destruction is an impossibility, but the assured stands upon the actual destruction as to him, his ownership in possession, use, and control of the property, as that particular subject matter insured. Thus, to take the case of a ship which has gone to the bottom of the sea and is wholly unable to be recovered, it is absolutely lost to assured as a ship; it has perished as to assured.[17] It may be stated also in this connection that a repaired ship is the original ship,[18] and if it can be repaired it is, as a general rule, not an absolute total loss.[19] The above statement is, however, subject to certain exceptions as in the case above noted of a sale of a derelict vessel by salvors. In so far, then, as the property is wholly destroyed, the line of demarcation between an absolute and constructive total loss is clear; so also is it in cases where it is once settled that the

Ins. Co., 169 N. Y. 504; 38 Hun (N. Y.), 86; 17 N. E. Rep. 369; Roux v. Salvador, 3 Bing. N. C. 286, per Lord Abinger; Murray v. Hatch, 6 Mass. 465, per Sewall, J.; Cossman v. West, L. R. 13. App. Cas. 174; Phœnix Ins. Co. v. McGhee, 18 Can. S. C. 61, per Strong; Great Western Ins. Co. v. Fogarty, 19 Wall. (U. S.) 640, per Miller, J. (machinery case); Judah v. Randal, 2 Caines Cas. (N. Y.) 324; Mullett v. Shedden, 13 East, 304. The California code provides that a total loss may be either actual or constructive; that an actual is caused: 1. By a total destruction of the thing insured: 2. The loss of the thing by sinking or being broken up; 3. Any damage to the thing which renders it valueless to the owner for the purposes for which it is held; or 4. Any other event which entirely deprives the owner of the possession at the port of destination of the thing insured. That a constructive total loss is one which gives the owner the right to abandon under the section of the code noted under the first section herein: Deering's Annot. Civ. Code Cal., secs. 2703-05.

[16] See secs. 2936, 2937, herein.

[17] Examine Murray v. Hatch, 6 Mass. 465, per Sewall, J.

[18] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 7, pp. 144, 145. He says: "A ship is always presumed the same, though all the materials which at first had given it existence have been successively changed. . . . . Idem populus, eadem navis, idem aedificium, idem grex, idem vivarium, etc."

[19] See Barker v. Janson, L. R. 3 C. P. 305, per Willis, J.

property has ceased to exist in specie or is otherwise irretrievably lost beyond the power of assured or the underwriter to secure its arrival, but in other cases the property may exist in specie or as property of the kind insured, and yet be placed by a peril insured against entirely out of assured's control or possession under circumstances rendering it very doubtful whether he will be able to again obtain possession or control thereof, or the danger of probable destruction may be highly imminent, or the expense of saving such as a prudent insured man could not undertake, having reference to the worth of the property as saved. In these and other cases which are noted throughout this chapter there is a constructive total loss, to which the doctrine of abandonment applies.[20] An absolute total loss may exist where a sale is justifiably and lawfully made and the title devested.[21] There may be a total loss of a vessel, even though after sinking she is raised again, if after being raised she is no longer a vessel in specie,[22] and the assured may recover a total loss without abandonment in certain cases although the vessel may still exist in specie; as in case of a justifiable sale by the master. The sea peril in such cases, and not the sale, is the cause of loss, although the sale devests the title.[23] So there may, it is held, be an absolute total loss of freight where the expense of forwarding the

[20] See Roux v. Salvador, 3 Bing. 286, per Lord Abinger; Stringer v. English etc. Ins. Co., Lim., L. R. 5 Q. B. 599; L. R. 4 Q. B. 676, per Blackburn, J.; Barker v. Janson, L. R. 3 C.P.305, per Willis, J.; Peele v. Merchants' Ins. Co., 3 Mason (C.C.),27, per Story, J.; Burt v. Brewers' etc. Ins. Co., 16 N. Y. Supr. Ct. 383; 9 Hun (N. Y.), 383; 78 N. Y. 400, per Talcott, J., and cases throughout this chapter.

[21] Mullett v. Shedden, 13 East, 304; Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 267, per Parker, C. J.; Cambridge v. Anderton Ry. etc. Co., 4 Dowl. & R. 203; 2 Barn. & C. 691; Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604.

[22] Merchants' S. S. Co. v. Commercial Mut. Ins. Co., 19 Jones & S. (51 N. Y. Supr. Ct.) 444; Carr v. Security Ins. Co., 109 N. Y. 104; 7 N. E. Rep. 369.

[23] Idle v. Royal Exch. Assur. Co., 7 Taunt. 756; McCall v. Sun Mut. Ins. Co., 66 N. Y. 515; Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 149; Bullard v. Roger Williams Ins. Co., 1 Curt. (C. C.) 152; Cambridge v. Atherton, 1 Russ. & M. 60; 2 Barn. & C. 91.

cargo from the port of detention is in excess of the original freight, and no freight pro rata is earned.[24]

§ 2895. **Election to Abandon—Recovery for Total or Partial Loss.**—The assured cannot be compelled to abandon, but he has his election to abandon or not in his discretion, and may use his own exertions to preserve the thing insured, or may await the final event and recover for a total or partial loss, as the case may be. The omission to abandon for a good cause does not deprive assured of his right to recover the actual loss sustained.[25] So it is held that where the assured declares for a total loss or for a captured vessel that he has not abandoned, the jury may deduct the spes recuperandi, and give a verdict for the balance as a partial loss.[26]

§ 2896. **Election to Abandon Necessary to Recovery of Constructive Total Loss.**—Assured must elect to abandon to entitle him to recover for a technical or constructive total loss;[27] for insured cannot recover for a constructive or technical loss in the absence of proof of abandonment and of

[24] Robertson v. Atlantic F. & M. Ins. Co., 68 N. Y. 145; Thwing v. Washington Ins. Co., 10 Gray (Mass.). See sec. 2930, herein.

[25] Pierce v. Ocean Ins. Co., 16 Pick. (Mass.) 92, per Shaw, C. J.; Graves v. Washington M. Ins. Co., 12 Allen (Mass.), 391; Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450; 22 Am. Dec. 377; Suydam v. Marine Ins. Co., 2 Johns. (N. Y.) 138; American Ins. Co. v. Francia, 9 Pa. St. 399; Murray v. Insurance Co., 1 Johns. Cas. (N. Y.) 413; 1 Am. Dec. 117; Thomas v. Rockland Ins. Co., 45 Me. 116; Marean v. United States Ins. Co., 3 Wash. (C. C.) 256; Goldsmith v. Gillies, 4 Taunt. 803; Gracie v. New York Ins. Co., 8 Johns. (N. Y.) 244, per Kent, C. J.; Mellish v. Andrews, 15 East. 16, per Lord Ellenborough; Earl v. Shaw, 1 Johns. Cas. (N. Y.) 314. See Roux v. Salvador, 3 Bing. N. C. 287, per Lord Abinger; Deering's Annot. Civ. Code Cal., sec. 2732.

[26] Wilson v. Insurance Co. of North America, 1 Binn. (Pa.) 147; 4 Dall. 283, quaere.

[27] Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 267, per Parker, C. J.; Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450; Townsend v. Phillips, 2 Root (Conn.). 400; Tunno v. Edwards, 12 East. 491, per Lord Ellenborough; Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348; Bell v. Nixon, Holt N. P. 423; Fleming v. Smith, 1 H. L. Cas. 535, per Lord Campbell; Barney v. Maryland Ins. Co., 5

notice of the same to insurer.[28] So without an abandonment there can be no recovery for a mere constructive total loss arising from an injury to more than half the value of the vessel,[29] and where a vessel, being forced into a port where no repairs could be made, was surveyed, broken up, and sold as old timber, it was held that there could be no recovery as for a total loss except upon abandonment.[30] So where a vessel was abandoned at sea by the master and crew, taken possession of by salvors, brought into port, libeled, and sold for salvage, and a balance was paid to the owner out of the proceeds of the sale and of the cargo, and no abandonment was made, it was decided that no recovery could be had for total loss, although insurers would be liable for the partial loss.[31] It is held, however, that an abandonment is not always necessary in case of salvage or total loss,[32] and also that there may be a recovery as for a constructive total loss in case of a justifiable sale by the master from necessity, even though there is no abandonment,[33] and also that a claim for a total loss operates as an abandonment.[34] If a disabled ship can be taken into port and repaired, even at an expense in excess of its value, it is not a constructive total loss unless notice of abandonment has been given.[35]

§ 2897. Election to Abandon Necessary, notwithstanding Fifty Per Cent and Actual or Technical Total Loss Clause.—Although the policy provides that there shall be no liability for total loss except there is a loss exceeding fifty per cent of the freight and an actual or total loss of the

Har. & J. (Md.) 139; Knight v. Faith, 19 L. J. Q. B. 509; 15 Q. B. 649; American Ins. Co. v. Francia, 9 Pa. St. 390; Davey v. Milford, 15 East. 549; Thomas v. Rockland Co., 45 Me. 116; Martin v. Crokett, 14 East. 446.

[28] Gomila v. Hibernia Ins. Co., 40 La. Ann. 553; 48 S. Rep. 490.

[29] Pierce v. Ocean Ins. Co., 18 Pick. (Mass.) 83; 29 Am. Dec. 567.

[30] Bell v. Nixon, Holt N. P. 423.

[31] Thomas v. Rockland Ins. Co., 45 Me. 116.

[32] Portsmouth Ins. Co. v. Brazee, 16 Ohio, 81; Roux v. Salvador, 3 Bing. N. C. 266; Farnsworth v. Hyde, 2 Mar. L. R. 187-429.

[33] Dunning v. Merchants' Mut. M. Ins. Co., 56 Me. 108.

[34] See sec. 2960, herein.

[35] Nova Scotia M. Ins. Co. v. Churchill, 26 Can. S. C. 65.

vessel, it is nevertheless necessary for the assured to abandon in order to claim for a constructive total loss, unless there is an actual total loss. The purpose of such a clause is merely to declare what shall constitute a constructive total loss.[36]

§ **2898. When Abandonment may be Made—Generally.** There must be a technical or constructive total loss to entitle assured to abandon.[37] But the right of abandonment does not depend on certainties, nor on the highest degree of probabilities of a total loss.[38] One important fact should be considered, and that is, that the doctrine of abandonment has reference to the constructive total loss of the subject itself; the thing insured must be threatened with entire destruction by a peril insured against. It need not be absolutely destroyed or irretrievably lost, yet its total destruction must be imminently probable; as in case where the ultimate arrival of the ship is so uncertain as to be in a high degree improbable or extremely doubtful; or where her condition or situation is such that, by reason of shipwrecks or capture, it is very uncertain, or the time unreasonably distant, when she will be restored so as to resume her voyage; or where there is no reasonable hope of repair unless at an expense disproportionate to the value of the ship or the benefits and objects of the adventure; or where there is a forcible dispossession or deprivation of assured's control over the goods as by capture, arrest, etc.; or where there is a constructive total loss of ship or goods, etc. The force exercised whereby the right to abandon may exist may be a moral or physical one, and may arise from acts of government or others, or from a peril of the sea within the policy. Instances, to a certain extent, of moral restraint or detention are embargoes, blockades, and arrests, depriving the owner of the free use of the ship; cases of physical restraint

[36] Hubbell v. Great Western Ins. Co., 74 N. Y. 246. See Boardman v. Boston M. Ins. Co., 146 Mass. 142; 16 N. E. Rep. 26; 6 N. E. Rep. 88.

[37] Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450; 22 Am. Dec. 337; Cazelet v. St. Barbe, 1 Term Rep. 187, per Buller, J.; Hanau v. Louisiana etc. Ins. Co., 15 La. Ann. 201.

[38] Wallace v. Thames etc. Ins. Co., 22 Fed. Rep. 66.

are forcible dispossession and ouster of ownership, as by capture. Perils of the sea cover those cases wherein such perils operate as a present total loss of the physical possession for all the useful purposes of the voyage, which while not amounting to an absolute total loss at the time, nevertheless the destruction of the thing is imminently probable.[39]

§ 2899. How far Right to Abandon Favored by Courts. While courts at the present day lean in favor of the right to abandon,[40] it is nevertheless declared that such right is not to be extended on light grounds,[41] and also, in the absence of binding authority, a construction is preferred "which restrains rather than that which enlarges the right to make a technical total loss."[42] While, however, the doctrine of technical total loss and the right to abandon should be favored, yet this rule should be applied with some degree of caution, having in view the rights of the parties, so that it may so far as possible in the particular case not operate as an injustice to the parties concerned, reference being had to indemnity to assured under the contract.

§ 2900. Invalid Abandonment of no Effect.—Although the assured may elect to abandon, yet the abandonment must

[39] Peele v. Merchants' Ins. Co., 3 Mason (C. C.), 27, per Story, J.; Roux v. Salvador, 3 Bing. N. C. 286, per Lord Abinger, C. B.; Anderson v. Wallis, 2 Maule & S. 240, per Lord Ellenborough; Dorr v. New England M. Ins. Co., 4 Mass. 221; Wood v. Lucalin Ins. Co., 6 Mass. 479; 4 Am. Dec. 163, per Parsons, C. J.; Mercadier v. Chesapeake Ins. Co., 8 Cranch (U. S.), 39; Rhinelander v. Insurance Co., 4 Cranch (U. S.), 29; Magoun v. New England M. Ins. Co., 1 Story (C. C.), 157; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 812; Robinson v. Commonwealth Ins. Co., 3 Sum. 224, per Story, J.; Herbert v. Hallett, 3 Johns. Cas. (N. Y.) 93, per Kent, C. J.; 2 Arnould on Marine Insurance (Perkins' ed. 1850, *1052, *1054, *1071, *1116, *1136; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1025, 1026, 1058, 1073.

[40] Sewall v. United States Ins. Co., 11 Pick. (Mass.) 95; Peele v. Merchants' Ins. Co., 3 Mason (C. C.), 27, per Story, J. See Roux v. Salvador, 3 Bing. N. C. 288.

[41] Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450; 22 Am. Dec. 337.

[42] Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 310, per Putnam, J.; Kettell v. Alliance Ins. Co., 10 Gray (Mass.), 144.

be under such circumstances, in such manner, such time, and upon such grounds as to make it valid, for an invalid abandonment will not have any effect.[43] Where the master sells the cargo illegally, the abandonment for a total loss confers no rights; but the insured may still claim for a partial loss.[44]

§ 2901. Abandonment Unnecessary in Case of Absolute Total Loss—Same, Goods, Commission, and Profits—Freights.—As stated in the first section of this chapter, abandonment implies something to abandon, and a notice thereof is only necessary when something still exists which is capable of abandonment within the meaning of that term, and where there is an absolute destruction of the subject matter, an abandonment is unnecessary to entitle assured to claim an absolute total loss. It would, in fact, be a useless act.[45] Thus, no abandonment need be made where a presumption exists that a long time unheard of vessel is lost.[46] So where a vessel is made a wreck

[43] Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456; Suydam v. Marine Ins. Co., 1 Johns. (N. Y.) 182. See Guerlain v. Col. Ins. Co., 7 Johns. (N. Y.) 527; Craig v. United States Ins. Co., 6 Johns. (N. Y.) 226; Pierce v. Ocean Ins. Co., 18 Pick. (Mass.) 93, per Shaw, C. J.; Bell v. Beveridge, 4 Dall. (U. S.) 272; McConochie v. Sun Mut. Ins. Co., 26 N. Y. 477; reversing 3 Bosw. (N. Y.) 99; Humphreys v. Union Mut. Ins. Co., 3 Mason (C. C.), 429.

[44] Rugely v. Sun Ins. Co., 7 La. Ann. 279.

[45] Burt v. Brewers' etc. Ins. Co., 78 N. Y. 400; 16 N. Y. Supr. Ct. 383; 9 Hun (N. Y.), 383; Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 267, per Parker, C. J.; Gordon v. Bourne, 2 Johns. (N. Y.) 150; Bondrett v. Hentigg, Holt N. P. 149; Walker v. Protection Ins. Co., 29 Me. 317; Mullett v. Shedden, 13 East, 304; Martin v. Crockett, 14 East, 465; Mellish v. Andrews, 15 East, 16, per Lord Ellenborough; Robinson v. Commonwealth Ins. Co., 3 Sum. (C. C.) 220; Phœnix Ins. Co. v. McGhee, 18 Can. S. C. 61, per Strong, J.; Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604, per Thompson, J. See Babbitt v. Sun Mut. Co., 23 La. Ann. 314; Davy v. Milford, 15 East, 559; Cassidy v. Louisiana Ins. Co., 18 Mart. (La.) 42; Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Cossman v. West, 13 App. Cas. 160; Portsmouth Ins. Co. v. Brazee, 16 Ohio, 81; Bullard v. Roger Williams Ins. Co., 1 Curt. (C. C.) 148; Deering's Annot. Civ. Code Cal., sec. 2709. "If assured could only abandon in the case of a total loss in the strict and natural sense of the words, there would be nothing to abandon, and abandonment would then be only a useless form": 2 Marshall on Insurance, ed. 1810, 559.

[46] Gordon v. Bourne, 2 Johns. (N. Y.) 150.

by a peril insured against, and is an actual total loss, abandonment is a futile act,[47] and inasmuch as the insurer is, by virtue of a sale justifiably made by the master of the vessel, vested with the proceeds, it seems that no abandonment need in such case be made.[48] If the right to commissions has become absolute there is nothing to abandon, and no claim as for constructive total loss will be sustained;[49] and in case of a total loss on profits, no abandonment is necessary.[50] If it is clear from all the circumstances of the case that the earning of freight has become so far impossible that there is an absolute total loss of freight, there is nothing to abandon, and abandonment is unnecessary.[51] If a vessel which has been driven back into her port of departure is in such a condition that she cannot be repaired for half her value, no freight pro rata itineris being earned, though the shippers have accepted the goods, and it not appearing that the goods could not have been forwarded at less than the amount stipulated in the charter-party, it is held that there is an absolute total loss of freight, and no abandonment is necessary, there being no salvage on freight and nothing to abandon.[52] So if by a peril insured against the property has been so far damaged or destroyed that a sale is justifiable, and the title is legally devested there-

[47] Walker v. Protection Ins. Co., 29 Me. 317.

[48] Fuller v. Kennebec M. Ins. Co., 31 Me. 325; Farnsworth v. Hyde, 18 Com. B., N. S., 835; The Sarah Ann, 2 Sum. (U. S.) 210; Mowry v. Charlestown Ins. Co., 6 Rich. (S. C.) 146; Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Prince v. Ocean Ins. Co., 40 Me. 482. But see American Ins. Co. v. Francia, 9 Barr. (Pa.) 390. See secs. 3123, 3124, herein.

[49] New York Ins. Co. v. Robinson, 1 Johns. (N. Y.) 616.

[50] Fosdick v. Norwich Ins. Co., 3 Day (Conn.), 108; Barclay v. Cousins, 2 East, 551; Mumford v. Hallett, 1 Johns. (N. Y.) 433.

[51] Wilson v. Foster, 6 Taunt. 25; Center v. American Ins. Co., 7 Cow. (N. Y.) 564; 4 Wend. (N. Y.) 45; Shipton v. Thornton, 9 Ad. & E. 314; Green v. Royal Exch. Assur. Co., 6 Taunt. 66; Robertson v. Atlantic etc. Ins. Co., 68 N. Y. 192. See Idle v. Royal Exch. Assur. Co., 8 Taunt. 755; 3 Moore, 115.

[52] Center v. American Ins. Co., 7 Cow. (N. Y.) 564; 4 Wend. (N. Y.) 45; Robertson v. Atlantic etc. Ins. Co., 68 N. Y. 19; Lord v. Neptune Ins. Co., 10 Gray (Mass.), 109.

by, an abandonment is not necessary.[53] So in case of the total loss of the vessel whose freight is insured, if no freight pro rata itineris has been earned, or if the expense of sending on the cargo by another vessel is equal to or exceeds the whole amount of the freight agreed upon by the charter party, it seems that there is an absolute total loss of the freight, and no abandonment is necessary.[54]

§ 2902. Abandonment by Owner of Part Interest—Joint Owner—Cotenant—Mortgagor—Mortgagee—Lienor.—If a person insures but part of his interest, he may make an abandonment of that part only.[55] So an abandonment by one joint owner who has insured in his own name "for whom it may concern" is good prima facie where there is no evidence of dissent by co-owners.[56] The rule as to abandonment by a cotenant does not apply to the case of a wreck which the underwriters, after examination by their agent, neither raise nor prevent the assured from raising; and they are not liable to the insured for any part of its value.[57] If a mortgagor of the vessel offers to abandon her to the underwriters, and the facts are such as to authorize an abandonment without objection by the insurers, on the ground of his want of authority, though they know of the mortgage and the mortgagee subsequently notifies them of his assent to the abandonment, the vessel being

[53] Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 267, Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604, per Thompson, J.; Idle v. Royal Exch. Assur. Co., 8 Taunt. 755; 3 Moore, 115; Brod. & B. 151, n.; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 464, per Putnam, J.; Vlierboom v. Chapman, 13 Mees. & W. 230.

[54] Robertson v. Atlantic Mut. Ins. Co., 68 N. Y. 192; 5 Jones & S. (N. Y.) 442; Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.) 107; Thwing v. Washington Ins. Co., 10 Gray (Mass.), 443.

[55] So held in Coolidge v. Gloucester Ins. Co., 15 Mass. 341, per Parker, C. J. See The Manitoba, 30 Fed. Rep. 129, and secs. 2904, 2905, herein.

[56] Reynolds v. Ocean Ins. Co., 2 Pick. (Mass.) 191; 33 Am. Dec. 127. See Kaltenback v. McKenzie, 3 C. P. D. 467, where one of the owners at a freight port did not abandon in time.

[57] Alleghany Ins. Co. v. Ramson, 69 Pa. St. 496.

still at their disposal, the underwriters cannot afterward object to the validity of the offer for want of authority.[58] If a mortgagee insures his own interest for his own security, the underwriters are entitled to an assignment of the debt equivalent in amount to that paid for the loss, and the underwriters may recover the same from the mortgagor, and this rule applies without regard to the relative values of the debt or extent of interest mortgaged and the mortgaged property; the same is true of any assured who has a lien upon the property and has assured such interest.[59] But if a second mortgagee whose lien is subject to that of a first mortgagee abandons, the transfer operates only to the extent of his interest.[60]

§ **2903. Successive Perils.**—Although the damage caused by one peril insured against is not sufficient to justify an abandonment, yet if the damage to the ship by successive perils is sufficient to warrant an abandonment, the assured, it is held, may abandon and recover as for a constructive total loss.[61]

§ **2904. Effect of Clause Requiring Assignment and Transfer of Interest—Extent of Interest Transferred.**—If a clause in a policy provides that "in all cases of abandonment the assured shall assign, transfer, and set over to said insurance company all their interest in and to said steamboat, and every part thereof, free from all claims and charges what-

[58] Insurance Co. v. Goodman, 32 Ala. 108.

[59] Carpenter v. Washington Ins. Co., 16 Pet. (U. S.) 495. In stating the rule in the text we have had in view the doctrine of abandonment as applied to marine risks. But so far as the doctrine of subrogation is concerned, in fire risks, there is some conflict of authority on the point, as noted elsewhere. See Kernochan v. New York Brewery F. Ins. Co., 17 N. Y. 428; 5 Duer (N. Y.), 1; Foster v. Equitable Ins. Co., 2 Gray (Mass.), 216; Smith v. Columbia Ins. Co. 17 Pa. St. 260, per Gibson, C. J.; Fowler v. Palmer, 5 Gray (Mass.), 549; Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 397, per Walworth, Ch.; King v. State Mut. Ins. Co., 7 Cush. (Mass.) 1. See as to general principle involved in rule in text, Brook Mut. F. Ins. Assn. v. Nelson, 41 N. J. Eq. 485; Howe v. Lamar etc. Ins. Co., 51 Ill. 409; Ætna F. Ins. Co. v. Tyler, 16 Wend. 385; 30 Am. Dec. 90; Callahan v. Linthicum, 43 Md. 110. But see chapter on subrogation, herein.

[60] Rice v. Cobb, 9 Cush. (Mass.) 902.

[61] Taber v. China Mut. Ins. Co., 131 Mass. 239. See c. lvii, herein, as to addition and aggregation of losses.

soever," it does not change the legal effect of an abandonment, nor does it have the effect of discharging insurers from their legal liability to account to assured for his proportion of the proceeds of the wreck after abandonment. The intent of such clause is merely to present the form in which the transfer should be made to the underwriters of the interest which they derive by law from the abandonment, and to point out the mode in which the intention to abandon should be unequivocally expressed and in case where interest of insured was only three-fourths, it was held that only this interest was transferred, and insurers should account for one-fourth of the proceeds after wreck, as the uninsured proportion of the net salvage for the abandonment did not carry that portion of the interest of which the owners were their own insurers.[62]

§ 2905. Abandonment Extends to Assured's Interest or Amount of Risk.—The abandonment covers assured's entire interest to the extent only of the risk taken or the interest covered by the policy, for with regard to the unprotected interest the assured is his own insurer, and the abandonment does not cover the excess.[63] So abandonment by a second mortgagee transfers only his interest in the vessel, and the first mortgagee is entitled to his proportionate interest in the salvage.[64] And where but a part valuation is insured, the owner becomes his own underwriter, and the net proceeds of the ship sold after abandonment must be divided as salvage between the

[62] Cincinnati Ins. Co. v. Duffield, 2 Handy (Ohio), 112. See Cincinnati Ins. Co. v. Bakewell, 4 B. Mon. (Ky.) 541, 544. But see the Manitoba, 30 Fed. Rep. 129, noted in next section.

[63] Emerigon on Insurance, Meredith's ed. 1850, c. xvii, secs. 7, 8, 12, pp. 686, 702, 722, et seq.; Cincinnati Ins. Co. v. Duffield, 6 Ohio St. 200, noted in sec. 2144, herein; Phillips v. St. Louis Perpetual Ins. Co., 11 La. Ann. 459; Havelock v. Lockwood, 8 Term Rep. 268. See Badger v. Ocean Ins. Co., 23 Pick. (Mass.) 347, per Putnam, J.; Chesapeake Ins. Co. v. Stark, 6 Cranch (U. S.), 268; Robert v. Traders' Ins. Co., 17 Wend. (N. Y.) 631; Hurtin v. Phœnix Ins. Co., 1 Wash. (C. C.) 400. "The abandonment cannot transfer the interest of the assured any further than that interest is covered by the policy": Arnould on Marine Insurance, Perkins' ed. 1850 *1159.

[64] Rice v. Cobb, 9 Cush. (Mass.) 302.

parties in that proportion each had at risk.[65] In a federal case, however, it is held that when the interest insured is that of a part owner, or when the entire owner insures some definite part, an abandonment is limited to a cession of the insured interest, but that if the insurance reaches every part of the ownership indiscriminately, an abandonment will extend to the entire property, though its value exceeds the amount of the insurance, and the claim of the owners to one-seventh of the salvage balance was held to be carried by the abandonment, and the claim was rejected.[66] Several of the cases cited in support of the text herein are declared by this decision not to be in accord with the law of this country, and one of said cases is distinguished.[67] The rule as evidenced by the above cases, however, is capable of being distinguished, and cannot fairly be considered as overruled by this last-noted federal case. So one who lets his ship to freight and charter may effect a policy not on gross freight, and stand his own insurer for a moiety of the risk, and recover the whole sum insured as for a total loss.[68]

§ 2906. Part of Cargo Discharged, Balance on Board —Freight at Risk.—If at the time of the loss there are goods on board equal in value to the sum insured under a time policy, and such portion is totally lost by a peril insured against, the assured on goods upon abandonment made is entitled to a full indemnity to the whole amount of the interest on board at the time of loss, without regard to any further interest originally insured by any policy and afterward discharged from the ship, and judgment may be given for the whole amount of the policy although it contains the American clause.[69] So in the case of freight as of goods only such

[65] Phillips v. St. Louis Ins. Co., 11 La. Ann. 459.

[66] The Manitoba, 30 Fost. & F. 129. See The Mary E. Perew, 15 Blatchf. (C. C.) 58.

[67] Relying upon Cincinnati Ins. Co. v. Bakewell, 4 B. Mon. 541; The Mary E. Perew, 15 Blatchf. (C. C.) 58; Mutual Safety Ins. Co. v. The Cargo of the George, Olcott (U. S.), 89.

[68] Etches v. Aldan, 1 Man. & R. 157; 6 L. J. K. B. 65.

[69] American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399 (one judge dissenting). Emerigon says: "If the goods which at the time of the

freight as is at risk at the time may be lost; as where a chartered vessel was insured for a specified amount for successive ports, one-half to be paid on arrival at a designated port and the remainder at the final port of destination, and one-half the charter money being paid as per agreement, the vessel was detained by embargo and an abandonment made, and the whole freight was held recoverable or in effect a loss of pending freight, one-half having been paid.[70] But in case of the freight of a ship if only part of the freight of an entire cargo is at risk, an adjustment is upon a pro rata valuation.[71]

§ 2907. Actual Freight Pending Less than Valuation —Freight on Board or not on Board.—If a policy is effected on freight valued on board or not on board, the time risks on freight applying under the policy to each cargo or voyage, if in ballast, not chartered successively, or to each charter successively in case the vessel be chartered, the fact that the actual freight pending is only equal to about one-fifth the valuation does not affect the right to recover on abandonment the full amount valued where there is a loss of more than one-half the cargo by a peril insured against.[72] So freight need not amount to the sum valued.[73]

disaster existed on board the ship are of a value relative to the sums insured, the insurers have nothing to complain of, and are to fulfill their engagement after abandonment made to them of what is saved from the wreck. It matters not that more or less goods had been theretofore loaded in the ship; it suffices that the aliment of the insurance exists on board at the time of the disaster itself. The discharge made in the course of the voyage can neither prejudice nor advantage the insurers, and in no respect alters their condition, provided that at the time of the disaster the aliment of the insurance has been found in the vessel": Emerigon on Insurance, Meredith's ed. 1850, c. xvii, sec. 8, p. 703.

[70] Livingston v. Columbian Ins. Co., 3 Johns. (N. Y.) 49; Charleston Ins. & T. Co. v. Corner, 2 Gill (Md.), 410. See Alison v. Bristol M. Ins. Co., 43 L. R. C. P. 311; 9 L. R. C. P. 559; reversing 42 L. J. P. 334.

[71] Forbes v. Aspinwall, 13 East, 323; Riley v. Hartford Ins. Co., 2 Conn. 368; Coolidge v. Gloucester Ins. Co., 15 Mass. 341.

[72] Boardman v. Boston M. Ins. Co., 146 Mass. 442; 16 N. E. Rep. 26; 6 N. Eng. Rep. 88.

[73] Dumas v. United States Ins. Co., 12 Serg. & R. (Pa.) 437, per Tilghman, C. J.

§ 2908. Freight Earned or Due—Successive Passages—Freight Valued—Freight Out or Home.—An abandonment has reference to freight pending freights earned at successive ports of delivery, or which have become covered by one policy, are freed from perils insured against, and therefore are no longer at insurer's risk, so that an abandonment cannot place them at insurer's charge. If the voyage insured covers successive passages under a valued policy on freight for a gross sum, as in case of an insurance "at and from" one port to another and "at and from thence back," the valuation applies to freight which is being earned in each successive and separate stage of the voyage; that is, to whatever amount of freight may be pending successively and at different times. This presumption may, however, be rebutted.[74] And where a policy was on freight valued from Teneriffe to Havana, "at and from" thence to New York, with liberty of shipping at Matanzas, at which port she stopped, unloaded cargo, and was paid freight thereon as to Havana, which was received in full, it was held that freight paid did not prevent recovering for a loss of freight homeward.[75] So in another case it is held that under a policy of insurance on freight from Boston to San Francisco, and thence to port or ports in the East Indies and to port of discharge in the United States, with liberty to return with a cargo of guano from the Chincha Islands, instead of the East Indies, freight earned on the outward voyage is not to be deducted from the valuation in the policy in computing a constructive total loss of freight on the passage from the Chincha Islands home.[76] In this connection, however, freight, as used to denote the compensation for the use of the ship, is to be distinguished from freight as compensation for transportation of merchandise. In the former case the ship is let to freight, or there is what is known as a charter-party

[74] Patapsco Ins. Co. v. Biscoe, 7 Gill & J. (Md.) 293; Insurance Co. v. Mordecai, 22 How. (U. S.) 111; Hugg v. Augusta Ins. Co., 7 How. (U. S.) 595; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Davy v. Hallett, 3 Caines (N. Y.), 16; Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.), 97.

[75] Hughes v. Union Ins. Co., 8 Wheat. (U. S.) 294.

[76] Thwing v. Washington Ins. Co., 10 Gray (Mass.), 443.

of affreightment, and an inchoate right to freight commences when the voyage is entered upon or commenced, for then the hire of the ship is at risk, and there is an entire freight for the whole voyage, though the latter is divisible and consists of several ports of destination terminating at the home port; as in case of a round voyage, one freight is due on completion.[77] Where freight was valued at two thousand dollars for the round voyage, the charterer to pay one-half on delivery of cargo and one-half on return home, the insurer was held liable for the valuation, for the contract was entire, although the vessel was lost on the outward voyage.[78] The earning of freight may, however, be suspended till the voyage is completed, and the whole sum valued be recovered at whatever stage the loss occurs.[79]

§ 2909. **Freight Valued—Loss of Vessel and Specie on Board to Purchase Cargo.**—If freight valued is insured from a specified port, and the vessel proceeds there to purchase cargo with specie on board therefor, but is able to obtain none at the port "from" specified, and is lost with part of the specie, it is held that no recovery can be had.[80]

§ 2910. **Freight Valued in Excess of Value of Carriage of Goods.**—It is declared that if freight is valued at a sum in excess of the value of the carriage of the goods, or above its gross amount, and the estimate is fairly made, the assurers are liable for the loss upon the basis of valuation. The insurers on freight may be liable for a total loss of it to the amount valued in the policy, notwithstanding it is largely overvalued.[81]

§ 2911. **Assured must have Some Interest to Abandon—Consignee.**—There must be some interest which is capable of transfer or assignment, some subject on which the aban-

[77] Riley v. Hartford Ins. Co., 2 Conn. 368, per Hosmer, J.; Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346; Thompson v. Taylor, 6 Term Rep. 478; Livingston v. Columbian Ins. Co., 3 Johns. (N. Y.) 49.

[78] Meech v. Philadelphia Ins. Co., 3 Whart. (Pa.) 473.

[79] Williams v. London Assur. Co., 1 Maule & S. 318.

[80] Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.), 97.

[81] Coolidge v. Gloucester M. Ins. Co., 15 Mass. 341.

donment can operate, for the transfer of ownership is of the very essence of abandonment. If there is nothing to be assigned or transferred, abandonment can be of no avail; as in case of an abandonment for an absolute total loss already noted.[82] Having this principle in view, the question arises whether a consignee has, by virtue of the possession of the bill of lading, such a possession and control of the property against the consignor that he may abandon. Mr. Phillips is of opinion that he has, and may abandon.[83]

§ 2912. Abandonment of Profits—Total and Partial Loss—Commissions.—Within the rule stated under the last section which implies that there should be something to transfer, something upon which the abandonment can operate, there can, upon principle, be no abandonment of expected profits. If the goods are wholly prevented from arriving by a peril insured against, there seems to be no necessity for an abandonment on the profits, for it is a total loss thereof, and if abandonment be made, there is nothing out of which the assurer can save any recompense to himself, except possibly that the abandonees on profits might claim the goods upon payment of the prime cost to the abandonees of said goods, which possibility seems doubtful on principle. An insurance may be effected on the profits of a voyage, and the insured may recover for a total or partial loss of them,[84] but he ought not to be permitted to convert a partial into a constructive total loss by an abandonment of something which can have no value to the insurer. As to commissions, the assurers undertake

[82] Sec. 2900, herein; Higginson v. Dall, 13 Mass. 96; Jardine v. Leathley, 3 Best & S. 700; 3 Fost. & F.; Potter v. Rankin, L. R. 5 C. P. 341, 372; Rankin v. Potter, L. R. 6 H. L. Cas. 83, 155, per Lord Chelmsford; Farnsworth v. Hyde, 18 Com. B., N. S., 835; Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249. But see 25 & 26 Vict., 63, sec. 3; Scottish M. Ins. Co. v. Turner, 1 Macq. H. L. Cas. 342, n., per Lord Truro; Fleming v. Smith, 2 H. L. Cas. 183.

[83] Phillips on Insurance, 3d ed., pp. 253, 254, sec. 1518. He says: "A consignee who has made advances on a shipment on which the bill of lading has been transmitted to him has sufficient control of the shipment as against his consignor to make an abandonment": See, also, Arnould on Marine Insurance, Perkins' ed., 1850, 1171, *1161; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 957.

[84] Abbot v. Sebor, 3 Johns. Cas. (N. Y.) 39.

that perils within the policy shall not prevent their being earned by a sale of the goods. If they do not accrue to assured by reason of non-arrival of the goods, it is a total loss, with nothing to transfer by an abandonment. This rule, however, would not apply to those cases where the right to receive commissions is vested by acts done by assured in relation to the cargo outward, and the payment thereof is dependent upon the sale of the homeward cargo, it being the proceeds of the outward. In such case there may be a transfer and release of the absolute right to such deferred payment of commissions. To these principles the text-writers all substantially agree.[85] It is declared in New York if the profits only be insured an abandonment is necessary when there has been no insurance on the cargo; and in such case it must be made early, that the insurer may elect either to pay only his loss or to pay that and the price of the goods at first cost and charges; therefore, if the assured lie by and take his goods and sell them, he cannot afterward call on the underwriter for any loss on the profits.[86] It is also suggested in the same state that the proper rule to ascertain whether there is a total or partial loss of profits is to determine whether more or less than one-half in value of the subject has been lost.[87] Where there was an insurance on profits on goods laden, and the vessel was captured and over fifty per cent of the goods restored, and an abandonment made as to the profits, the assured was only permitted to recover a partial loss on the profits.[88]

§ 2913. Several Kinds of Merchandise Insured for One Sum, Parts cannot be Abandoned.—If cargo consisting of several kinds of merchandise is insured for one gross amount

[85] See Fosdick v. Norwich Ins. Co., 3 Day (Conn.), 108; Robertson v. Col. Ins. Co., 8 Johns. (N. Y.) 383; Tom v. Smith, 3 Caines (N. Y.), 245; New York Ins. Co. v. Robinson, 1 Johns. (N. Y.) 616; 2 Phillips on Insurance, 3d ed., pp. 244-46, secs. 1503, 1504, p. 354, sec. 1654, et seq.; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1054, *1050, *1051; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1023; 2 Parsons on Marine Insurance, ed. 1868, 170, 171.

[86] Tom v. Smith, 3 Caines (N. Y.), 245.

[87] Abbot v. Sebor, 3 Johns. (N. Y.) 139; 2 Am. Dec. 139, per Kent, C. J.

[88] Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36.

without distinguishing the amounts on the several kinds of goods, the insurance covers the merchandise indiscriminately, and abandonment cannot be made of one part and the other retained, but it extends to the entire property, and covers the whole.[89]

§ 2914. Several Kinds of Merchandise Insured Distinctly and Separately—Separate Valuation.—If a cargo consisting of several kinds of merchandise is insured by the same policy by a distinct and separate insurance of a specified amount on one kind and another separate amount on another, these are in effect different and separate insurances, and abandonment may be made as to one and the other retained. The same is true where two distinct policies are effected on separate articles, whether by one insurer or several.[90] Whether a mere separate valuation operates as a distinct insurance upon the article so separately valued is a question considered elsewhere, and, according to the conclusions there stated, the intent of the parties must determine whether a separate and distinct insurance was contracted. If it is clearly manifest that it was intended to specifically insure each article, then an abandonment could undoubtedly, in accordance with the rule last stated, be made on any article found to be so separately insured, but if it is clearly apparent that but one entire insurance was intended, then the separate valuation does not of itself warrant assured in making abandonment of part only,

[89] Emerigon on Insurance, Meredith's ed. 1850, c. xvii, sec. 8, pp. 701, 702, who illustrates thus: "I cause myself to be insured indefinitely ten thousand livres on cargo, or on such and such goods loaded in such a vessel, without distinguishing anything. This insurance is one unica assecuratio omnium mercium. I may not abandon my sugars and retain my indigoes": Followed in 2 Marshall on Insurance, ed. 1810, *600; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1158; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 954; Phillips on Insurance, 3d ed., 359, sec. 1660; citing Guerlain v. Col. Ins. Co., 7 Johns. (N. Y.) 527. So, also, in 2 Parsons on Marine Insurance, ed. 1868, 118; citing the last case, and referring also to Humphreys v. Union Ins. Co., 3 Mason (C. C.), 429; Morean v. United States Ins. Co., 1 Wheat. (U. S.) 219, and other cases. So, also, 3 Kent's Commentaries, 5th ed., 329. Deering's Annotated Civil Code, section 1487, provides that an abandonment must not be partial.

[90] See authorities under last section.

but some reference should be had to the practice of the insurers in such cases.[91] It is held, however, that a separate valuation is so far conclusive that an abandonment may be made of each article so valued, notwithstanding there is not a specific distinct insurance on each.[92] So under certain code provisions a separate valuation of any particular portion is a ground of abandonment.[93]

§ 2915. Separate Interest in Ship, Cargo, and Freight. Emerigon says, substantially, that if a sum is insured confusedly and without discrimination on ship and cargo, an abandonment cannot be made of either interest separately, but if a different sum is specified and applied to each, then abandonment can be made of each interest separately,[94] and this accords with Mr. Marshall's rule.[95]

[91] 3 Kent's Commentaries, 5th ed., 329; see note 9 Ins. L. J. 60. Examine sec. 2902, et seq., herein.

[92] Deiderich v. Commercial Ins. Co., 10 Johns. (N. Y.) 234.

[93] Deering's Annot. Civ. Code Cal., sec. 2177. Mr. Marshall also states the rule that "if in the same policy they be separately valued, I may abandon any one article and retain the rest," but this is upon the ground that "there are, in effect, distinct insurances though in the same policy": 2 Marshall on Marine Insurance, ed. 1810, *601. Mr. Arnould has no doubt that the rule as stated by Mr. Marshall is acted on, in practice especially. Mr. Maclachlan is also of like opinion: 2 Arnold on Marine Insurance, Perkins' ed. 1850, p. *1158; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 955, citing Emery v. Rogers, 1 Esp. 208. Mr. Phillips, however, says: "Mere divers kinds of articles of the same cargo are indiscriminately insured in the same policy against the same risks; a separate abandonment of any of them cannot be made though they are separately valued: 2 Phillips on Insurance, 3d ed., pp. 360, 361, sec. 1661. This rule, however, is not in direct conflict with that above given by us, for this writer evidently has in mind those cases only where it is apparent that a separate insurance was not intended on each.

[94] Emerigon on Insurance, Meredith's ed. 1850, c. xvii, sec. 8, p. 703.

[95] 2 Marshall on Insurance, ed. 1810, *601. But Mr. Phillips says certain cases "favor the doctrine that where the amount insured is insured indiscriminately upon the different interests of ship, cargo, and freight, one of those interests may be separately abandoned. But the point cannot be considered as settled": 2 Phillips on Insurance, 3d ed., 358, sec. 1659. Mr. Arnould evidently favors Emerigon's rule, and Mr. Maclachlan, referring to Mr. Phillips' cases, says: "They

§ 2916. Constructive Total Loss—Outfits of Whaling Ship.—The constructive total loss of a whaling ship at a port where whaling outfits are bought and sold and where the outfits are in safety is not a constructive total loss of the outfits, although no vessel is obtainable within a reasonable time to carry forward the outfits on the voyage insured.[96]

§ 2917. Abandonment and Constructive Total Loss of Ship and Freight—Apportionment—English Doctrine.—It has been said in an English case where there was a policy on ship and freight and an abandonment of both by reason of detention by embargo and seizure, and ship and cargo were restored and freight earned before action brought, that there was no total loss on freight for which the underwriter was liable, and that the underwriters on freight had nothing to do with any loss of freight which had arisen to assured by reason of the abandonment of the ship,[97] but that an abandonment and recovery on freight in such and like cases is not precluded where freight is not ultimately earned before action brought.[98] The rule in England, however, seems to be that if ship and freight be separately insured and abandoned to different sets of underwriters, the abandonees of the ship take by the transfer the whole freight then pending and ultimately earned on arrival, and that nothing passes to the abandonee of freight; the principle being that freight is inseparably incident to the ship, and that a transfer of the ship carries her rights and pending engagements; that if there is an entire contract, the freight is not apportionable except there be an express stipulation; if there is then pending at the time

are of no value upon the point": 2 Arnould on Marine Insurance, Perkins' ed. 1850, *1157; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 954, n. The cases noted are Stocker v. Harris, 3 Mass. 413; Coolidge v. Gloucester M. Ins. Co., 15 Mass. 341; Hurtin v. Phœnix Ins. Co., 1 Wash. (C. C.) 400. See Deering's Annot. Civ. Code Cal., sec. 2717.

[96] Macy v. China Mut. Ins. Co., 135 Mass. 328.

[97] McCarty v. Abel, 5 East, 388.

[98] Thompson v. Rowcroft, 4 East, 34; Scottish M. Ins. Co. v. Turner, 1 Macq. H. L. Cas. 340, per Lord Truro.

the entire freight of the voyage, the whole passes to the abandonee, but that in case freight pro rata has become due before the loss, or where by a delivery of a part of the cargo at an intermediate port freight is thereby earned under the charter-party, the abandonee of the ship does not take by such transfer such previously earned freight. Again, the abandonee of freight, the original cargo being lost and there being no abandonment of the ship, or the right under the abandonment of the ship not being enforced, may recover as salvage from the assured the freight earned by forwarding another cargo less the necessary expense of earning the same, although expenses incurred merely for the purpose of necessary repairs are not to be deducted from the freight.[99]

§ 2918. **Abandonment and Constructive Total Loss—Ship and Freight—Apportionment Doctrine in this Country.**—In case of ship and freight the owner has undoubtedly the right to effect distinct insurances on each, and by the established principles of insurance law effect must be given to each pol-

[99] 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1154, 1164, *1144-55; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1082, et seq. The cases cited considered in the 1850 edition are Sharp v. Gladstone, 7 East, 24; Thompson v. Rowcroft, 4 East, 34; Leatham v. Terry, 3 Bos. & P. 479; McCarty v. Abel, 5 East, 388; Ker v. Osborne, 9 East, 378; Case v. Davidson, 5 Maule & S. 79; 2 Brod. & B. 379; 3 Moore, 116; 8 Price, 542; Chinnery v. Blackburn, 1 H. Black. 117, notes; Morrison v. Parsons, 2 Taunt. 407; Dean v. McGhie, 12 Moore, 185; 3 Kent's Commentaries, 5th ed., 333, n. a; and in the 1887 edition: Stewart v. Greenock M. Ins. Co., 2 H. L. Cas. 159; Scottish M. Ins. Co. v. Turner, 1 Macq. H. L. Cas. 334; confirming McCarty v. Abel, 5 East, 388, etc. Upon the point of nonliability of insurers on freight when freight has been earned, the case of Scottish Marine Co. v. Turner, 1 Macq. H. L. Cas. 334, is approved in Lord v. Neptune Ins. Co., 10 Gray (Mass.), 109; followed in Fiedler v. New York Ins. Co., 6 Duer (N. Y.), 282. But see next section. It is also said by Mr. Maclachlan that "if there be no pending freight, although there be cargo on board, as where the assured is both owner of ship and cargo, the abandonees of ship recover nothing in the name of freight or for the use of the ship, except for so much of the voyage as is accomplished with the cargo on board after the abandonment": 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1085; citing Miller v. Woodfull, 27 L. J. Q. B. 120; 8 El. & B. 493; Brome v. Worth, 8 Exch. 1.

icy, and an abandonment on the ship does not take away the remedy on the freight insurance. The insurer on freight must be assumed to have entered into the contract with a knowledge of the fact of insurance on the ship, and that abandonment will be made in a justifiable case, and must have known also that the law intended such a probability, and must be presumed conclusively to know to what extent under the law the claims of the underwriter on the ship are paramount. He must, therefore, submit to a total loss in every such case, with the exception of the ratable freight which does not go with the abandonment. So that when a vessel and freight are separately insured, an abandonment of the vessel to the insurer of the vessel does not preclude the insured from recovering on the policy on freight, and if the insured abandons to the insurers on the vessel, he may recover from the latter for the loss on freight, deducting pro rata if any freight has been earned.[100] So where there was a policy on ship and freight valued separately, but insured by the same company, it was declared that until the abandonment as to the ship the property remains in assured, and the freight—the earnings—remain in him, but after the loss the insurers by abandonment become the owners, are liable for repairs and expenses, and are entitled to the earnings of the ship; that if assured stands his own insurer for the freight, the earnings of the ship belong to him up to time of the loss, but otherwise as to the insurer on freight in case of abandonment.[101] And where the voyage was performed after an abandonment made and accepted, it was held that freight subsequently earned belonged to the abandonees on the ship, and the rule was in favor of an apportionment.[102] It is also said that it is the better opinion that the abandonment of the ship deprives the insurer on freight of his salvage or the hope

[100] Davy v. Hallett, 3 Caines (N. Y.), 16; 2 Am. Dec. 241, and opinion of Kent, C. J.; Thwing v. Washington Ins. Co., 10 Gray (Mass.), 443, per Bigelow, J.; Livingston v. Columbia Ins. Co., 3 Johns. (N. Y.) 49.

[101] Coolidge v. Gloucester Ins. Co., 15 Mass. 341, per Parker, C. J., and Putnam, J.

[102] United Mut. Ins. Co. v. Lenox, 1 Johns. (N. Y.) 377; affirmed, 2 Johns. (N. Y.) 443.

of any indemnity.[103] The rule in this county is, therefore, this: That if a vessel and freight are separately insured after an abandonment made to each set of underwriters, the underwriters on the freight are entitled to the freight earned before that time, and the underwriters on the vessel to the freight earned after; that is, the freight is equitably apportioned with reference to the time of the disaster to which the abandonment relates.[104] So the abandonment entitles assurer to the earnings by way of freight accruing after the disaster, and in an action to recover from insurers freight paid to them as abandonees of a vessel the assured is only entitled to the freight earned prior to the disaster.[105]

§ 2919. Assignment to Assured by Underwriter on Vessel on Compromise—Recovery of Freight Loss Pro Rata. If a shipowner has his freight and vessel insured with two different underwriters, and on capture abandons first to those on the vessel and then to those on the freight, taking afterward fifty per cent of his claim on the underwriters on the vessel, and in payment of the other fifty an assignment of their rights in the vessel, he will be entitled to receive the freight which they would have been entitled to, and to recover from the insurers on the freight the full amount of his policy deducting the pro rata freight earned previous to the abandonment on the voyage on which captured.[106]

§ 2920. Insurer as Assignee of Owner of Cargo may be Liable for Freight Money to Owner Who has Settled with Insurer on Vessel.—If the insurer of cargo shipped

[103] Livingston v. Columbian Ins. Co., 3 Johns. (N. Y.) 49, per Kent, C. J.

[104] Hammond v. Essex F. & M. Ins. Co., 4 Mason (C. C.), 196; Kennedy v. Baltimore Ins. Co., 3 Har. & J. (Md.) 367; Symonds v. Union Ins. Co., 1 Wash. (C. C.) 443; Lord v. Neptune Ins. Co., 10 Gray (Mass.), 122, per Shaw, C. J.; Leavenworth v. Delafield, 1 Caines (N. Y.), 573.

[105] Kennedy v. Baltimore Ins. Co., 3 Har. & J. (Md.) 367. The California code provides that after an abandonment made and accepted the insurer upon freight is entitled to freightage earned prior to the loss, but that subsequently earned belongs to the underwriters upon the ship: Deering's Annot. Civ. Code Cal., sec. 2730.

[106] Davy v. Hallett, 3 Caines (N. Y.), 16; 2 Am. Dec. 241.

on an insured vessel becomes the assignee of the rights and interest of insured on the cargo, and both insurers raise the boat and send it to its destination, and the shipowners settle with the underwriters on the boat as for a partial loss, the insurer of the cargo is liable to said owner of the vessel for the freight money; at least this is so held in New York.[107]

§ 2921. How far Freight upon Cargo a Charge upon Underwriter on Cargo as between Insured and Insurer. It is declared in a federal case that as between the insured and insurer on cargo the latter is not responsible for the payment of freight, whether there is or is not an abandonment of the cargo, for the contract with the underwriter on goods does not undertake to indemnify the owner for the charge of freight upon the cargo.[108] Where under an insurance of a ship and goods belonging to the same owner from Philadelphia to Barbadoes the ship was obliged to put into Antigua, and there broken up and sold with the cargo, the net proceeds of both being paid to the supercargo, it was held that on abandonment by the insured for a total loss they were not entitled to deduct from such proceeds to be credited to the insurers a pro rata freight to Antigua; that the insured on the ship had no right as against insurers of the cargo, to freight pro rata itineris.[109] And in a New York case it is decided that the insurer on the cargo has nothing to do with the freight, and the acceptance of the net proceeds of the cargo by the insurers after the abandonment forms no ground for a claim of freight against them.[110] It was also declared in this last case that the acceptance must be voluntary and conditional to form the basis of a new charter to pay freight pro rata.[111] It is also

[107] Hughes v. Sun Mut. Ins. Co., 100 N. Y. 58; 12 Daly (N. Y.), 45 (the chief justice and two associate judges dissenting).

[108] Caze v. Baltimore Ins. Co., 7 Cranch (U. S.), 358. See opinion of Story, J. (ship and goods belonged to the same owner in this case). See Hubbell v. Great Western Ins. Co., 74 N. Y. 225, per Rapallo, J.; Searle v. Scovell, 4 Johns. Ch. (N. Y.) 218; Mumford v. Commercial Ins. Co., 5 Johns. (N. Y.) 262.

[109] Armroyd v. Union Ins. Co., 3 Binn. (Pa.) 437.

[110] Marine Ins. Co. v. United Ins. Co., 9 Johns. (N. Y.) 186.

[111] See, also, Caze v. Baltimore Ins. Co., 7 Cranch (U. S.), 358.

held that if the underwriters on cargo, in order, to obtain possession of the salvage, have paid freight to the shipowner, such amount may be deducted from the loss, or a recovery be had therefor from assured, even though there has been a previous settlement as for a total loss, and that the law in such cases is not varied by the circumstance that assured is owner of the ship; that the shipowner has a lien on the cargo for freight due him.[112] Mr. Phillips, however, states the rule that "on abandonment of the cargo the salvage comes into the hands of the underwriter subject to the charge of freight for the voyage that is covered by the policy."[113] It is held in South Carolina that if the owner of a ship and cargo abandons to the underwriters as for a total loss by perils of the sea, and part of the goods be saved, the underwriters are liable for freight pro rata to the owner, for the owner has a lien on the goods for freight.[114] And where by reason of an accident to a propeller loaded with a cargo of wheat insured on a voyage from Chicago to Buffalo a portion of the cargo was

[112] Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383, per Story, J.; Gibson v. Philadelphia Ins. Co., 1 Binn. (Pa.) 405; McKibben v. Peck, 39 N. Y. 262; Caze v. Baltimore Ins. Co., 7 Cranch (U. S.), 358, per Story, J.; Baillie v. Modigliani, 2 Marchall on Insurance, ed. 1810, *728. Lord Mansfield says: "The question is, whether the owner of the goods can charge the underwriters with this item which was paid for freight pro rata itineris by the owners of the goods to the owners of the ship. . . . . As between the insured and the underwriters upon the cargo, it is a contract of indemnity, and the latter have nothing to do with the freight. The owner of the ship has a lien for his freight. . . . . In the case of a loss total as between the insurer and the insured with salvage, the owner may either take the part saved or abandon, but in neither case can he throw the freight upon the underwriters because they have not engaged to indemnify him against and have nothing to do with it": 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1197, *1183, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 976, 977. In the edition of 1850, Mr. Arnould says that in practice the underwriter on goods, in case of a justifiable sale at a port of necessity bears the loss on freight.

[113] 2 Phillips on Insurance, 3d ed., 409, sec. 1718. See Id. 678, sec. 1138; 338, sec. 1632; 344, sec. 1639. Examine Dakin v. Oxeley, 33 L. J. C. P. 115.

[114] Teasdale v. Charleston Ins. Co., 2 Brev. (S. C.) 190; 3 Am. Dec. 705.

damaged, and repairs becoming necessary an abandonment was made, and a total loss paid and possession of the cargo taken, and a portion of the damaged cargo sold and delivered at the place of disaster, and a portion delivered at the destination, it was held that insurers were subrogated to the rights of the shippers, and the master was entitled to freight pro rata, and also for full freight for the goods delivered at the destination.[115]

§ 2922. **Surrender of Cargo or Voluntary Abandonment of Voyage where Freight Due or might have been Earned—Master's Right to Earn Freight and Duty to Forward Goods.**—If the freight is insured, than neither the owner nor the master of the vessel can voluntarily surrender or abandon the cargo to the shipper or underwriter free of freight upon the occurrence of any injury short of a technical total loss or inability to deliver the goods in specie at the port of destination. If the owner demands the goods at the port of detention, the master should make payment of full freight a condition to the delivery; if he surrenders the cargo without payment, he cannot be held liable.[116] If the shipowner voluntarily surrenders the cargo to the abandonees without payment of freight, where freight is due or might have been earned, he cannot resort to the insurers on freight for the recovery of freight so lost.[117] In such cases the insurers on cargo, without voluntary surrender, cannot lawfully take it from the owner without payment of freight, because he has a right to keep it for a seasonable time for repairs, completion of the voyage,

[115] Propeller Mohawk, 8 Wall. (U. S.) 153. But see Atlantic Ins. Co. v. Bird, 2 Bosw. (N. Y.) 195; Hubbell v. Great Western Ins. Co., 74 N. Y. 246.

[116] Allen v. Mercantile etc. Ins. Co., 44 N. Y. 437; Lawrence v. New Bedford Ins. Co., 2 Story (C. C.), 471; Bryant v. Commonwealth Ins. Co., 6 Pick. (Mass.) 131.

[117] In this case the ship went ashore and became a total loss, and about two-thirds of the cargo was taken out, transshipped, delivered at the port of destination in safety, and sold. An abandonment was made to the insurers on cargo who recovered the proceeds of the sale: Hubbell v. Great Western Ins. Co., 74 N. Y. 246; Herbet v. Hallett, 3 Johns. Cas. (N. Y.) 93.

and to earn full freight.[118] If the shipowner voluntarily abandons the voyage and employs the vessel in another enterprise, as where the cargo might have been forwarded and freight earned, but the shipowners, or the master acting in their behalf, unjustifiably sell the cargo while it remains in specie, they have no claim against the cargo owners by way of lien, set-off, or otherwise for the payment of freight on the cargo sold, and in such cases no freight is due.[119] So the shipowner has a right to insist upon carrying the cargo and earning full freight where the vessel, although grounded and leaky, is still in safety, and can be repaired at a small expense in a short time.[120] In case the ship is so damaged as to be reparable, the right of the master to retain the goods for repairs to the ship cannot extend, however, beyond a reasonable time, having in view all the facts and circumstances of the case, such as place, time, the nature of the disaster, and the character and condition of the cargo; and in cases of forwarding the goods by another vessel much the same circumstances govern, including also the availability of another vessel at the port of disaster or a port immediately contiguous thereto, or at a port within reasonable time and distance, and the trouble and cost of procuring the same, and the expense of forwarding the cargo within reasonable limitations. This rule is subject to the right of the shipper to pay full freight.[121] If the vessel

[118] Allen v. Mercantile Mut. Ins. Co., 44 N. Y. 437; reversing 46 Barb. 642; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Griswold v. New York Ins. Co., 1 Johns. (N. Y.) 205; 3 Johns. (N. Y.) 321; Clark v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 189.

[119] Lord v. Neptune Ins. Co., 10 Gray (Mass.), 109. See, also, Marks v. Louisiana State M. & F. Ins. Co., 3 Rob. (La.) 454.

[120] In this case the insured abandoned, but there was no express acceptance, and it was held not a case for abandonment: Griswold v. New York Ins. Co., 1 Johns. (N. Y.) 205; 3 Johns. (N. Y.) 321.

[121] McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 276; Clark v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 104; Searle v. Scovill, 4 Johns. Ch. (N. Y.) 218, per Kent, C. J.; Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.) 107, per Yeates, J.; Philpott v. Swan, 11 Com. B., N. S., 270; 30 L. J. C. P. 358; Jordan v. Warren Ins. Co., 1 Story (C. C.), 342, per Story, J.; Wilson v. Royal Exch. Assur. Co., 2 Camp. 626, per Lord Ellenborough; Bradhurst v. Col. Ins. Co., 9 Johns. (N. Y.) 20; Hugg v.

is capable of taking home the cargo, the master must act as a prudent uninsured owner would have acted.[122] Where the insured was consignee, master, and joint owner, and there was a sale at a port of necessity, it was held that freight pro rata was earned, and that there was a reception by the cargo owner, and so only a partial loss of freight.[123] So in a Maryland case it is decided that if a vessel puts into a port of distress and cannot be repaired so as to be capable of completing the voyage, and the shipper demands and the owner delivers the goods at such intermediate port, it is a case of freight pro rata earned, and the underwriters will be liable for a partial loss only, for if a vessel puts into a port of distress and is capable of being repaired so as to complete the voyage, the shipper has no right to intervene and demand the goods at such intermediate port without paying the full freight for the voyage. But the shipper may take the goods at an intermediate port and the shipowner may deliver rather than forward. This case is that of pro rata freight earned and a partial loss. It would seem, however, that there must be a beneficial service rendered by the ship to the cargo.[124] If the master is prevented by the shipper's refusal from forwarding the goods, full freight is then earned.[125] Where the expense of sending on the cargo by another vessel will exceed fifty per cent of the freight, the assured may abandon as for a technical total loss of the freight, but otherwise where a proportionate part of the cargo on which the freight is to accrue and which may be forwarded exceeds fifty per cent.[126] If the ship is driven back to the port of departure and there abandoned as for a to-

Augusta Ins. etc. Co., 7 How. (U. S.) 395; Herbet v. Hallett, 3 Johns. Cas. (N. Y.) 93; Schieffelin v. New York Ins. Co., 9 Johns. (N. Y.) 21. See Lockwood v. Atlantic Mut. Ins. Co., 47 Mo. 50.

[122] Green v. Royal Exch. Assur. Co., 6 Taunt. 68.

[123] Williams v. Smith, 2 Caines (N. Y.), 13.

[124] Merchants' Mut. Ins. Co. v. Butler, 20 Md. 41; McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405. But see Field v. Citizens' Ins. Co., 11 Mo. 50.

[125] See Jordan v. Warren Ins. Co., 1 Story (C. C.), 342; Bradhurst v. Col. Ins. Co., 9 Johns. (N. Y.) 17, per Kent, C. J.; Hunter v. Prinsep, 10 East, 378.

[126] American Ins. Co. v. Center, 4 Wend. (N. Y.) 45, per Walworth, Ch.; McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405.

tal loss, no freight pro rata itineris being earned, though the goods are accepted by the shipper, the loss on freight is absolute, and the master is not bound to procure another vessel and proceed with the goods to warrant a recovery on the freight policy.[127] And it is also declared that if the injury is such as to justify the exercise of the right for abandonment as for a technical total loss of the vessel, a loss of freight is involved, for she is no longer in a position to earn freight, and the shipper cannot require the shipowner to repair the vessel for the purpose of forwarding the cargo, and that he can only be required to send it on if another vessel can be procured; that if the ship is totally lost or rightfully abandoned before the voyage is completed she cannot earn full freight.[128]

§ **2923. Freight Earned.**—Whether freight is the price paid for the hire of a ship under a charter-party or that paid for the carriage of goods in the ship, the insurance on freight intends an indemnity if the freight which could have been earned is prevented from being earned by the intervention of a peril insured against. It is this inchoate right to freight which constitutes an insurable interest and which involves the attachment of the risk.[129] So if the vessel is seasonably ready to prosecute her voyage, and freight might have been earned, the insurers on freight are discharged, although a large portion of the cargo has been necessarily jettisoned and most of that discharged at the port of distress is sea damaged, putrid, and not fit for transportation, and requires great care to preserve it, and is sold.[130] And insurers on the freight of a ship for a voyage are not liable for a total loss where there has been no total loss of the ship and the goods could have arrived in specie at the port of destination, although the ship has been obliged

[127] Center v. American Ins. Co., 7 Cow. (N. Y.) 564.

[128] American Ins. Co. v. Center, 4 Wend. (N. Y.) 45, per Walworth, Ch.; Thwing v. Washington Ins. Co., 10 Gray (Mass.), 443.

[129] See McGaw v. Ocean Ins. Co., 23 Pick (Mass.) 409, per Shaw, C. J.; Scottish M. Ins. Co. v. Turner, 4 H. L. Cas. 312, n.; 20 Eng. L. & Eq. 24; Everth v. Smith, 2 Maule & S. 278.

[130] Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Griswold v. New York Ins. Co., 1 Johns. (N. Y.) 205; 3 Johns. (N. Y.) 321.

by a peril insured against to put back to her port of departure, and the goods after being damaged by that peril to the extent of more than half their value, or to the extent of goods yielding more than half the freight, have been sold there according to the interests of all parties except the insurers on freight. The sale of the cargo in its damaged condition was for the interest of the owners of the vessel and cargo, and owing to the fact that freight had arisen the ship obtained a higher rate of freight on the new voyage than she would have earned on the old. The owners of the cargo had declined to demand it or to cause it to be dried, or to require the shipowner to proceed, and the court declared that the freight was lost not by any peril within the policy, but by the voluntary preference to abandon the cargo and employ the vessel in another enterprise, and that the insurers on freight were not liable where freight is earned.[131] So although the ship is abandoned, yet if the cargo is carried to its destination or is forwarded by the master, there is no loss on freight,[132] and notwithstanding that goods are a total loss to the shipper as goods of any value for any available purpose to him, and the vessel is not so injured as to be incapable of performing her voyage, and the cargo remains capable of delivery at the port of destination, or the goods arrive and are delivered and exist physically in specie as goods of that particular character or kind which were shipped, the freight, in case of delivery, is due, and there is no total loss of freight.[133] But if there is a total destruction in specie of the cargo, the underwriters are

[131] Lord v. Neptune Ins. Co., 10 Gray (Mass.), 109.

[132] As in a case of policy on freight, the vessel has been disabled at sea, but there is not a constructive total loss, and the cargo has been actually delivered, there is no liability on the part of the underwriter for loss of freight: Fiedler v. New York Ins. Co., 6 Duer (N. Y.), 282; Roselto v. Gurney, 11 Com. B. 176; Shipton v. Thornton, 9 Ad. & E. 304.

[133] Hugg v. Augusta Ins. etc. Co., 7 How. (U. S.) 595; Parsons v. Manufacturers' Ins. Co., 16 Gray (82 Mass.), 463. Examine as to "specie": Williams v. Kennebec Mut. Ins. Co., 31 Md. 455; Williams v. Cole, 16 Md. 207; Tudor v. New England Ins. Co., 12 Cush. (Mass.) 554; Depeyster v. Sun Mut. Co., 19 N. Y. 272; 17 Barb. (N. Y.) 306; Skinner v. Western M. & F. Ins. Co., 19 La. 273.

liable for a total loss on freight.[134] It is held, however, in Massachusetts that where there is a policy upon ship and freight valued separately, but insured by the same company, if there is a constructive total loss of the vessel and she is abandoned, the freight may be abandoned, although the vessel is afterward repaired and proceeds on the voyage and earns all the freight, and that if there is a constructive total loss of the vessel freight insured may be recovered.[135] It is decided in a Missouri case that after a vessel is disabled by a peril insured against and under circumstances evidencing a total loss, the freight earned in respect to the cargo does not affect the right of action under the policy except as to adjustment of its amount.[136]

§ 2924. Claim for Pro Rata Freight.—If the circumstances are such as to entitle the master to insist upon his right to forward the goods, and he is willing and ready to forward them to their port of destination, or if there has been a beneficial service rendered by the ship to the cargo, and the owner, consignee, or shipper's agent voluntarily and unconditionally accepts the goods at the intermediate port, the ship-owner or his agent choosing to deliver them, the law raises a promise to pay freight pro rata itineris. But the acceptance must be voluntary and unconditional.[137] Other questions are, however, involved in the consideration of this point, which will be apparent from the cases under this section, as well also as from decisions cited under the last note.

[134] Ridyard v. Phillips, 4 Blatchf. (C. C.) 443. See, also, Parsons v. Manufacturers' Ins. Co., 16 Gray (82 Mass.), 463.

[135] Coolidge v. Gloucester Ins. Co., 15 Mass. 341. See Rogers v. Nashville Ins. Co., 9 La. Ann. 537.

[136] Willard v. Manufacturers' Ins. Co., 24 Mo. 561.

[137] M'Gaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Merchants' Ins. Co. v. Butler, 20 Md. 41; Propellor Mohawk, 8 Wall. U. S.) 153; Vlierboon v. Chapman, 13 Mees. & W. 238; Armroyd v. Union Ins. Co., 3 Binn. (Pa.) 437; Gray v. Waln, 2 Serg. & R. (Pa.) 229; Caze v. Baltimore Ins. Co., 7 Cranch (U. S.), 358; Hopper v. Burness, L. R. 1 C. P. D. 142; Marine Ins. Co. v. United Ins. Co., 9 Johns. (N. Y.) 186; Williams v. Smith, 2 Caines (N. Y.), 13; Acatos v. Burns, L. R. 3 Ex. D. 282; McKibben v. Peck, 39 N. Y. 262; Hurtin v. Phœnix Ins.

§ 2925. **Freight Earned—Goods Transshipped—New or Substituted Voyage.**—If a vessel is chartered under a time policy and is obligated by reason of a peril insured against to put back, and an abandonment is made and accepted, but the charter is completed by hiring another vessel, and freight is earned and received at the port of destination as provided by the terms of the charter party, the master acts in such case as the agent of the shipowner in completing the contract and earning freight, and the abandonees of the ship are not entitled to any part of the freight earned unless they can prove the master's acts to have been done as their agent.[138] And the charterer may, under justifiable circumstances, determine the charter party and hire another vessel and abandon, and recover as for a total loss of freight.[139] If a voyage is broken up, and there is a loss of more than half on the freight insured, there may be an abandonment as for a constructive total loss. This right is not impaired by the safe arrival of the merchandise at the port of destination on another vessel on which it has been reshipped.[140] So where owing to damage by sea perils the ship puts back and another voyage is substituted in which freight is earned, such freight cannot be considered as salvage to the underwriters on freight, for they cannot recompense themselves for losses sustained on an insured and terminated voyage out of freight earned on a new and different voyage which they have not insured. And there may be a recovery in such case for freight for such of the goods

Co., 1 Wash. (C. C.) 530; Atlantic Ins. Co. v. Bird, 2 Bosw. (N. Y.) 195. See Allen v. Commercial Ins. Co., 44 N. Y. 437; Griswold v. New York Ins. Co., 3 Johns. (N. Y.) 321; 1 Johns. (N. Y.) 205; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Hugg v. Augusta Ins. etc. Co., 7 How. (U. S.) 595; 2 Phillips on Marine Insurance, 3d ed., 340, et seq., secs. 1634-36; 2 Parsons on Marine Insurance, Perkins' ed. 1850, 1052, *1049, *1140; 2 Parsons on Marine Insurance, Maclachlan's ed. 1887, 357, 358.

[138] Hickie v. Rodocanachi, 4 Hurl. & N. 455; 28 L. J. Ex. 273; Jur., N. S., 550. So far as Stewart v. Greenock M. Ins. Co., 2 H. L. Cas. 159, conflicts, held mere dicta.

[139] Jackson v. Union M. Ins. Co., L. R. 8 C. P. 572. But see Henderson v. Mart of Orleans, 12 La. Ann. 352.

[140] Royal v. Nashville Ins. Co., 9 La. Ann. 537.

as are physically lost.[141] In New York a policy was made on freight from Riga to New York. The bulk of the cargo consisted of hemp, and the residue of manufactured goods and iron. The vessel sprung a leak and put into Kinsale in distress, where, after a survey, she was found incapable of prosecuting her voyage unless repaired at an expense equal to her value, and the master, with the advice of merchants and others at Kinsale, sold the hemp there and shipped the residue of cargo in another vessel to New York, which, however, was not capable of taking more than one-third of the hemp, as there was no machinery to pack and stow it in the Russian mode. It was held that the insured were entitled to recover for a total loss of the freight, it not appearing that the goods reshipped had reached New York, or that any freight had been earned.[142] If a vessel sails on her voyage and is driven ashore by stress of weather a short distance from her port of departure, where the cargo is taken out and returned to said port, and the vessel itself is brought back and repaired, there is no such damage as justifies giving up the voyage and substituting a different one, and the insurer on freight is not liable.[143] If the original cargo be lost, another cargo may be carried and freight earned on the same voyage, or the balance thereof. This new freight will in such cases be salvage on the original freight.[144]

§ 2926. Freight Earned—Part of Cargo Reaching Abandonee on Cargo Equivalent to Reaching Owner.—

[141] Jordan v. Warren Ins. Co., 1 Story (C. C.), 342; Charleston Ins. & T. Co. v. Corner, 2 Gill (Md.), 410. Jordan v. Warren Ins. Co. cites Anderson v. Wallis, 2 Maule & S. 240; Everth v. Smith, 2 Maule & S. 278; Herbert v. Hallett, 3 Johns. Cas. (N. Y.) 93; Griswold v. New York Ins. Co., 3 Johns. (N. Y.) 321; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Whitney v. New York Ins. Co., 18 Johns. (N. Y.) 208; M'Gaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Moody v. Jones, 4 Barn. & C. 394. And see Parsons v. Manufacturers' Ins. Co., 16 Gray (Mass.), 463.

[142] Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.) 107; 7 Am. Dec. 290.

[143] Herbet v. Hallett, 3 Johns. Cas. (N. Y.) 93.

[144] Green v. Royal Exch. Assur. Co., 6 Taunt. 68; Puller v. Staniforth, 11 East, 232; Everth v. Smith, 2 Maule & S. 278, per Lord Ellenborough.

Where the ship went ashore and was a total loss, and about two-thirds of the cargo was transshipped and safely delivered at the port of destination, where it was sold, and the proceeds received by the insurers, abandonees of the cargo, it was held that if part of the cargo reached the abandonee on cargo this was equivalent to reaching the owner, so far as earning freight was concerned.[145]

§ 2927. **Freight for Forwarding Less than Original Freight.**—If the vessel puts into a port of necessity and the goods are forwarded for less than the original freight by another vessel, the consignees are obligated nevertheless to the extent of the freight under the original contract, for the forwarding is deemed to be in furtherance of the said contract, and the delivery takes place thereunder. It is not of the essence of the contract that the cargo should be covered by the particular ship mentioned, for the party may change the ship by necessity.[146]

§ 2928. **Freight for Forwarding Same as Original Freight.**—If by reason of the peril insured against a vessel is so far disabled that she is prevented from completing her voyage and compelled to reship her freight at the same rate which she was to receive under an open policy insuring her freight lists, the loss is total and the insurer liable therefor.[147] If the shipper consents to receive the goods at a port to which the vessel has been put back or at an intermediate port of necessity, and another ship can be obtained to send on the goods, or the original vessel can be repaired in a reasonable time to transmit the cargo in specie, there exists an implied promise to pay freight pro rata itineris, provided there has been a beneficial service rendered cargo by the ship, but there is none if

[145] Hubbell v. Great Western Ins. Co., 74 N. Y. 246. See sec. 2921, "How far freight on cargo a charge," etc.

[146] Roselto v. Gurney, 11 Com. B. 176; Shipton v. Thornton, 9 A. & B. 314. See Bradhurst v. Col. Ins. Co., 9 Johns. (N. Y.) 17, per Kent, C. J., as to last clause in text.

[147] Blanks v. Hibernia Ins. Co., 36 La. Ann. 599.

the cost of transporting the goods from said port to their destination equals the stipulated freight.[148] And where part of a ship's cargo was destroyed and the ship was injured, and the master returned to the port of departure and restored the sound part of the cargo to the shipper, as it could not be forwarded at a lower rate of freight, it was held that the insurer of the freight was liable for the loss of freight on the part of the cargo destroyed alone.[149] It is held in England that the master is not justified in selling the goods, although the delay and the expense necessitated in forwarding them involves an amount equal to the stipulated original freight, and therefore the underwriters are not liable for a loss of the freight.[150] In another case the insurance was upon freight valued. The vessel sprung a leak and repairs could not be had, and the cargo was transshipped at about the same freight the vessel would have earned had the original voyage been completed. There was a constructive total loss of the vessel and an abandonment; therefore it was held that the insurer on freight was liable notwithstanding the safe delivery of the goods, for the vessel being wholly lost the power to earn freight was lost.[151]

§ 2929. Freight for Forwarding Same as Original Freight—River Risk.—If the freight lost is insured under a river risk, and the same rate of freight is compelled to be paid on transshipment as that to be received under the original contract, the loss of freight will be total, for it is held that the rule under which the master may repair the vessel and forward the goods and earn freight does apply with the same force to river craft as to vessels navigating the high seas, inasmuch as in the former cases the voyages are short, and shippers have a right to expect and require a prompt forwarding of the goods to their destination, and that their goods shall not be detained

[148] M'Gaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405.

[149] M'Gaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405.

[150] Mordy v. Jones, 4 Barn. & C. 394.

[151] Thwing v. Washington Ins. Co., 10 Gray (Mass.), 443. See Boardman v. Boston M. Ins. Co., 146 Mass. 442; 16 N. E. Rep. 26, where the last case is cited. But examine Clark v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 204.

in case of accident to await lengthy repairs.[152] This ruling, however, is only an application of the rule that the master may require a reasonable time for repairs, a reasonable time in river risks being different than in sea risks strictly so called.

§ 2930. Freight for Forwarding in Excess of Original Freight.—In case of a technical total loss of a vessel insured, if the expense of sending on the cargo by another vessel will exceed fifty per cent of the freight agreed upon by the charter-party, it is a technical loss of the freight authorizing an abandonment.[153] So it is held that the loss of more than half cargo in specie by perils insured against authorizes the insured to abandon freight and claim for total loss thereof.[153a] It was, however, declared in this case that the only benefit of an abandonment under such circumstances is to throw the expense and risk of collection and other incidental expenses upon the underwriter, and to enable assured to recover the whole amount without delay.[154] So where the repairs of the ship exceeded half the value of the goods, and assured accepted an abandonment of the ship but refused that upon the freight, it was held that the insurers on freight valued were liable for the whole amount thereof, even though the ship performed her voyage and delivered her cargo at her destination, and in this case the freight was overvalued.[155] And in another case the expense of forwarding exceeded the freight originally stipulated, and it was held a total loss of freight. In this case the risk was upon a river voyage.[156] It will be seen,

[152] Blanks v. Hibernia Ins. Co., 36 La. Ann. 599, opinion Fenner, J.; Field v. Citizens' Ins. Co., 11 Mo. 50; Roe v. Crescent Mut. Ins. Co., 11 La. Ann. 408.

[153] American Ins. Co. v. Center, 4 Wend. (N. Y.) 45, per Walworth, Ch.

[153a] American Ins. Co. v. Center, 4 Wend. (N. Y.) 45.

[154] Center v. American Ins. Co., and American Ins. Co. v. Center, 4 Wend. (N. Y.) 45; 7 Cow. (N. Y.) 564, per Walworth, Ch. But see 2 Parsons on Marine Insurance, ed. 1868, 162.

[155] Coolidge v. Gloucester Ins. Co., 15 Mass. 341. See Dunning v. Merchants' Mut. M. Ins. Co., 57 Md. 108; Moss v. Smith, 9 Com. B. 94.

[156] Willard v. Millers' etc. Ins. Co., 24 Mo. 561. See Lockwood v. Atlantic Mut. Ins. Co., 47 Mo. 50.

however, from an examination of the cases that this question is somewhat involved with that of the right of the master to sell or to forward the goods, deliver them, complete the contract, and earn the freight; as also the nature of the contract of insurance on freight as one of indemnity. Thus, it is held that, in determining whether another vessel ought to be procured to forward the cargo, regard must be had to the fact whether the expense or freight to be paid therefor would exceed the freight which would have been earned had the voyage been completed. If so, then the insurer on freight would have no right to require the master to procure another ship to send it on to the port of destination. So also the question of constructive total loss of the vessel and abandonment therefor is involved.[157] In another case where the vessel was stranded but the expense of forwarding the goods saved exceeded the freight thereon, an abandonment as for a total loss of freight was held justified.[158] So if such expense for forwarding the cargo exceeds the value of the goods upon arrival, there would be a total loss of freight justifying an abandonment.[159] It is also pertinent to notice in connection herewith that it is declared that the contract with the underwriters on freight is not that the voyage shall yield a profit to assured, nor that the freight shall not exceed that originally stipulated or the aggregate gross amount payable on delivery of the goods.[160] We have also considered under prior sections the right of the insured to recover on freight where freight is earned before abandonment made, or, as in England, before action brought,[161] which point is also involved in this question.

[157] Hugg v. Augusta Ins. etc. Co., 7 How. (U. S.) 595; Taney (C. C.), 159; Thwing v. Washington Ins. Co., 10 Gray (Mass.), 443. See Callender v. Insurance Co. of North America, 5 Binn. (Pa.) 525; Mount v. Harrison, 4 Bing. 388; 1 Moore & P. 14; Mordy v. Jones, 4 Barn. & C. 394; Whitney v. New York Ins. Co., 18 Johns. (N. Y.) 208.

[158] Robertson v. Atlantic Mut. Ins. Co., 5 Jones & S. (N. Y.) 442; Callendar v. Insurance Co. of North America, 5 Binn. (Pa.) 525.

[159] Michael v. Gillespy, 26 L. J. C. P. 306. See De Caudra v. Swann, 16 Com. B., N. S., 772.

[160] Ogden v. General Mut. Ins. Co., 2 Duer (N. Y.), 215, per Bosworth, J.

[161] See secs. 2917, 2918, herein.

So the expense of earning freight where the goods are so forwarded is held at the charge of the insurers, but it is also held that there is a total loss of freight.[162] Again, where the ship has been so far disabled by a peril insured against that a transshipment is necessary, and there is an increased freight for so forwarding in another ship, the cargo owner is liable for the excess over the originally stipulated freight, and it is held, although there is a question concerning the matter, that the underwriter on cargo is liable for such excess which the cargo owner has been compelled to pay.[163] In the line with the argument it is held that it is a general rule that if the vessel is wholly lost by a peril insured against, the power to earn freight is lost, and the insurer becomes liable under his contract, and that the rule is the same where there has been a constructive total loss and abandonment of the vessel, and that the right of the owner in cases of constructive total loss to abandon his vessel cannot be restricted or taken away by the existence of policies on the cargo and freight, and therefore the insurer of freight is liable when the expense of transshipment is not less than half the stipulated freight.[164] So it is held that the loss of more than half the cargo in specie by perils insured against authorizes insured to abandon freight and claim for total loss thereof.[165]

[162] American Ins. Co. v. Center, 4 Wend. (N. Y.); 7 Cow. (N. Y.) 564, per Bosworth, J.; Kidson v. Empire Ins. Co., L. R. C. P. 535, 536; L. J. C. P. 156; affirming 35 L. J. C. P. 250; repudiating Bradhurst v. Commercial Ins. Co., 9 Johns. (N. Y.) 17, per Kent, C. J.

[163] Searle v. Scoville, 4 Johns. Ch. (N. Y.) 218, per Kent, C. J.; Hugg v. Augusta Ins. Co., 7 How. (U. S.) 609; Shipton v. Thornton, 9 Ad. & E. 214; Dodge v. Union M. Ins. Co., 17 Mass. 471; Mumford v. Connecticut Ins. Co., 5 Johns. (N. Y.) 262; Matthews v. Gibbs, 30 L. J. Q. B. 55; Hubbell v. Great Western Ins. Co., 74 N. Y. 246; Center v. American Ins. Co., 4 Wend. (N. Y.) 45; Roselto v. Gurney, 11 Com. B. 176; 1 Phillips on Insurance, 3d ed., 678, sec. 1138; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 964, *960; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 734.

[164] Thwing v. Washington Ins. Co., 10 Gray (Mass.), 443. See Boardman v. Boston M. Ins. Co., 146 Mass. 442; 16 N. Eng. Rep. 26; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45, per Walworth, J.

[165] Boardman v. Boston M. Ins. Co., 146 Mass. 442; 16 N. Eng. Rep. 26. See 2 Phillips on Insurance, 3d ed., 388, 341, secs. 1631, 1635.

§ 2931. Clause not to Abandon Vessel except Loss Exceeds One-half Value not Applicable to Freight Claim Based on Loss of Cargo—Same, Cargo.—If a policy on freight stipulates that insured shall not abandon, where the vessel remains in specie, unless the amount which insurer would be liable to pay after the usual deductions shall exceed one-half the vessel's value, and that the highest value insured on the vessel under any policy shall constitute the basis of ascertaining a technical total loss of freight, and other parts of the policy regulate the claim for freight upon loss of specific articles of the cargo, such clause applies to the vessel to the extent that it cannot prevent an abandonment as for a total loss of freight based upon a technical total loss of the cargo.[166] And where the policy provides that insured shall not have the right to abandon the vessel unless the amount of damage merely which assured shall be liable to pay under an adjustment as for a partial loss exceeds half the amount insured, such clause is not applicable to an insurance on cargo, but applies solely to the ship.[167]

§ 2932. Vessel Arriving—Obligation of Consignee to Obtain Permission to Land Cargo—Freight Earned.—If an obligation rests upon the consignee to obtain permission to land the cargo, which has been refused the master at the port of destination by the authorities, and a tender of the cargo, to be paid for as soon as possible after delivery, is made the consignee who is on board the vessel and to whom the cargo is by agreement to be delivered on payment of a specified sum, the freight is earned and insurer discharged, although the master returns with the cargo to the port of departure where an abandonment is made but refused.[168]

§ 2933. Freight Paid in Advance—Specie and Returns thereof—"Cash on Account of Freight."—If one-half the freight on a chartered ship is prepaid and one-half the

[166] Boardman v. Boston M. Ins. Co., 46 Mass. 442; 6 N. Eng. Rep. 88; 16 N. E. Rep. 26.

[167] Robinson v. Commonwealth Ins. Co., 3 Sum. (C. C.) 220.

[168] Morgan v. Insurance Co. of North America, 4 Dall. (U. S.) 455.

cargo is lost and the rest delivered, the freight should be applied pro rata on that delivered, and the insurers are not liable for a total loss on the freight on that part of the cargo which is lost but only one-half the freight thereon.[169] Where the insurance was on specie and returns thereof, with liberty to declare and value thereafter, and the vessel was chartered, but the terms were not communicated to insurer, and the goods for the return voyage were purchased by the agent of insured by whom specie was sent, it was held that the advances for account of the vessel were not, properly speaking, freight and were not to be considered a part of the value of the merchandise shipped for the return voyage.[170] If the master is justified in abandoning the voyage by reason of damage sustained and inability to make repairs, except at an unwarranted expense compared with the value of the vessel and the freight she would have earned on said voyage, and the freight for forwarding exceeds that under the original charter-party, there may be a recovery as for a total loss on freight prepaid under a policy on "cash on account of freight," [171] Where freight prepaid is insured, the insurer cannot avoid liability merely on the ground that it may be recovered back because it has been lost.[172]

§ 2934. Freight Valued—Carried or not Carried—Laden or to be Laden—Part of Cargo Laden.—If the insurance is on freight valued carried or not carried, and a part of the cargo is on board and the remainder ready to be shipped when the vessel is lost by a peril insured against, the insurer is entitled to recover for a total loss according to the valuation in the policy.[173] So where the policy is on freight laden or

[169] Allison v. Bristol M. Ins. Co., 43 L. J. C. P. 311; 9 L. R. C. P. 559; reversing 42 L. J. C. P. 334.

[170] Winter v. Haldiman, 9 L. J. K. B. 313; 2 Barn. & Adol. 649.

[171] De Caudra v. Swann, 16 Com. B., N. S., 772. See Griggs v. Austin, 3 Mass. 20, per Parker, C. J.

[172] Katheman v. General Mut. Ins. Co., 12 La. Ann. 35. Examine De Silvale v. Kendal, 4 Maule & S. 37; Saunders v. Drew, 3 Barn. & Adol. 445; Mashiter v. Buller, 1 Camp. 84, per Lord Ellenborough; Providence-Washington Ins. Co. v. Bowring, 1 U. S. C. C. A. 583; 1 U. S. App. 183.

[173] De Longuemere v. Phœnix Ins. Co., 10 Johns. (N. Y.) 127.

to be laden, with liberty of certain ports, and the freight out was earned and cargo laden purchased out of part of the proceeds, and she sailed for another port to obtain the balance of her cargo and was lost, the insurers' liability was restricted to the freight only of the cargo laden.[174]

§ 2935. Affreightment—Freight which might have been Earned—Cargo Partly Loaded—Contract for Freight—Cargo Ready, etc.—In case of freight or hire to be paid for under the terms of the charter-party to the shipowner for the use of his ship, the right to freight may be referred in its inception to the commencement of the performances which entitles assured to freight under the charter-party rather than to the loading of goods on board. So that the whole amount of freight may be recovered although no cargo has ever been put on board ship, provided the loss has arisen from a peril within the policy. The ship, however, must be in a fit condition to earn freight, except the contract be such as to preclude the question of the ship's condition. We have, however, fully considered this question elsewhere. If the policy provides for liability in case of "actual total loss" only, these words are held to intend the destruction of the thing specifically; the subject of insurance must be destroyed as that thing in specie. There must be no spes recuperandi; the words must be construed with reference to the meaning of an absolute total loss and to guard against any liability where the expense of repairs would exceed the value of the vessel when repaired or where the vessel is not worth repairing, and this being true, the operation of the fifty per cent rule would be excluded by such restriction of liability.[175] There may be a constructive total loss sufficient to justify an abandonment and recovery for loss of freight where there is such a loss by sea perils as to commercially end the adventure and justify the ter-

[174] Riley v. Hartford Ins. Co., 2 Conn. 368. See, also, Boardman v. Boston M. Ins. Co., 146 Mass. 442; 16 N. E. Rep. 26; 6 N. Eng. Rep. 88; Patapsco Ins. Co. v. Pisco, 7 Gill & J. (Md.) 293.

[175] Burt v. Brewers' etc. Ins. Co., 16 N. Y. Supr. Ct. 383; 9 Hun (N. Y.), 383; 78 N. Y. 400; Murray v. Hatch, 6 Mass. 465.

mination of the charter-party.[176] It is held, however, that abandonment for a constructive total loss does not appear to apply as a doctrine to the contract of affreightment.[177] But there may be an absolute total loss of freight under the charter-party or under bills of lading for shipments by other parties where, by a peril within the policy covering the freight, the chance of earning freight is totally destroyed or prevented.[178] The character of the loss may also be such that no abandonment is necessary, as where the benefit conferred upon the insurers conveys no tangible or appreciable right. Thus, a vessel was chartered to proceed from A. to B. to load for L., which was a part of the voyage covered by the policy, the insurance being also on chartered freight, from A. to L. The vessel sustained damage by sea perils, and the expense of repairing her would have exceeded her value when repaired plus the homeward freight. The vessel was detained at B., where the charterer had stopped payment, and his agents there refused to load, and at that place she became a total wreck. The court declared that, no obligation existing to repair the ship, the charterers were released; that the only benefit conferred upon insurers by notice of abandonment was a possibility of acceptance upon application to the charterer to transship and forward the cargo, which was not a tangible and appreciable right, for he was not obligated to take another vessel but was entitled to the vessel for which he had contracted; that assured was justified in abandoning the ship and was nevertheless entitled to claim a total loss on freight, and that notice of abandonment having been given as soon as the true condition of the vessel was known, the notice, if necessary, was within sufficient time.[179] Under a contract of affreightment, if the insurance provides that the risk is to attach from the loading of the goods on board, no liability for a total loss exists until they are so load-

[176] Jackson v. Union M. Ins. Co., L. R. 10 C. P. 125, per Bovill, C. J., dissenting. See Tully v. Howling, 2 Q. B. D. 186.

[177] Henderson v. Maid of Orleans, 12 La. Ann. 352.

[178] Attorney v. Lindo, 4 Bos. & P. 236.

[179] Potter v. Rankin, 6 L. R. Eng. & I. App. 83; 6 H. L. Cas. 83; affirming 42 L. J. C. P. 169; 39 L. J. C. P. 147; L. R. 5 C. P. 341; reversing 37 L. J. C. P. 257; 3 L. R. C. P. 562.

ed.[180] If a gross sum is to be received at the final port of destination, the charterer is not obligated to pay full freight where the vessel is forcibly taken away from the intermediate port before her lading is completed.[181] But if by a peril insured against, the ship, which has commenced her voyage to a port where she is to take in cargo, is prevented from taking on any cargo, there is a total loss of freight.[182]

§ **2936. Policy against "Absolute" or "Actual" Total Loss Only.**—If the policy be against "absolute" or actual" total loss only, this excludes the right to make an abandonment and thereby convert a partial into a total loss.[183] In a Louisiana case goods were shipped on board a vessel and insured only against general average and absolute total loss. The vessel while on its voyage was wrecked on a reef. Nearly all the cargo, badly damaged, was saved by wreckers, was taken into port, libeled, and condemned for salvage and subsequently sold, and in the average adjustment the owners received their proportion of the net proceeds of the cargo of the vessel. It was held that the insurance company was not liable.[184] But there may be an actual total loss of a vessel within a marine insurance policy although the vessel remains in specie, where it is, notwithstanding, irretrievably lost to the owner.[185] Thus where a wrecked vessel is insured against "actual total loss only," and a notice of abandonment is served which is not accepted, and

[180] Gordon v. American Ins. Co., 4 Denio (N. Y.), 360.

[181] Charleston Ins. etc. Co. v. Corner, 2 Gill (Md.), 410.

[182] Thompson v. Taylor, 6 Term Rep. 478; Moses v. Pratt, 4 Camp. 297; Hodgson v. Mississippi Ins. Co., 2 La., N. S., 341; Flint v. Flemyng, 1 Barn. & Adol. 45; 8 L. J. K. B. 350; Horncastle v. Swart, 7 East, 399; Foley v. United F. & M. Ins. Co., 5 L. R. C. P. 155; 33 L. J. C. P. 206; Davidson v. Willasey, 1 Maule & S. 313; Barber v. Flemyng, 5 L. J. Q. B. 59; 39 L. J. Q. B. 25; Atty v. Lindo, 4 Bos. & P. 236; Montgomery v. Egginton, 3 Term Rep. 362; Simmonds v. Union Ins. Co., 1 Wash. (C. C.) 382, 443; Williamson v. Innes, 1 Moody & R. 88; 8 Bing. 80, n.

[183] Monroe v. British etc. Ins. Co., 52 Fed. Rep. 777

[184] Gould v. Louisiana etc. Ins. Co., 20 La. Ann. 259.

[185] Carr v. Providence-Wash. Ins. Co., 38 Hun (N. Y.), 86; 12 Cent. Rep. 650; affirmed, 109 N. Y. 504.

the ship is sold to satisfy the claim of salvors employed by insurers, who had the right under the policy to rescue the vessel, and the insured is not a party to the contract with wreckers, and has no notice of the sale, the insurers cannot deny that it was a total loss.[186] If the policy provides only against the risk of "general average and such total loss only as may arise from the absolute destruction of the property," and part of the cargo, consisting of articles of different classes, were stolen or lost while being reshipped to be carried forward after the stranding of the vessel, it was held not such a total destruction of the thing insured as to warrant a recovery.[187] So it is held that the insurer of a ship under a policy against "total loss only," even if a time policy, may recover for a constructive total loss.[188]

§ 2937. **"Absolute and Total Loss Only" and Jettison.**—An "absolute total loss only" does not arise from a jettison of the cargo if part of the goods are saved.[189]

§ 2938. **Whether Abandonment Excluded by Clauses "Free from Partial Loss," "Free of Average," etc.—Same, Perishable Goods.**—The question whether constructive or technical total losses and abandonments are excluded by such clauses as "free from partial loss," "free of average," and the like, has been the subject of much discussion, especially in cases of goods perishable in their nature. It is declared in an early English case by Lord Mansfield that if perishable articles are insured free of average, there must be "an absolute" destruction of the goods by the wreck of the ship to amount to a

[186] Carr v. Providence-Wash. Ins. Co. (N. Y.), 17 N. E. Rep. 369; 12 Cent. Rep. 650; 38 Hun (N. Y.), 86; affirmed 109 N. Y. 504.

[187] Guerlain v. Columbia Ins. Co., 7 Johns. (N. Y.) 527.

[188] Heebner v. Eagle Ins. Co., 10 Gray (Mass.), 131; 69 Am. Dec. 308. Under a certain code provision a policy confined in terms to an actual total loss excludes a constructive total loss, but if assured is deprived of the possession at the port of destination of the entire thing, it is a loss within the policy: Deering's Annot. Civ. Code Cal., sec. 2112.

[189] Monroe v. British etc. Ins. Co. (U. S. C. C. A. 1893), 52 Fed. Rep. 777.

total loss, and "if the commodity specifically remains the underwriter is discharged."[190] It is held in a New York case, but not in a court of last resort, under a clause "free from average," that a constructive total loss is not to be presumed to be provided for by language in a policy fairly susceptible of a contrary interpretation, and that a written clause controls the printed ones.[191] Again in the same state it is also held that if perishable articles so insured physically exist the insurer is not liable by reason of their being rotten or good for nothing.[192] So in another case in the same state, under a like warranty, it is decided that the insurer is only liable for an actual, as distinguished from a technical, total loss. In this case the article insured was corn, and the vessel, being driven into a port of necessity, was unable to obtain repairs or a place to put her cargo. The vessel was also delayed because of yellow fever, and the corn was so damaged as to be unmerchantable and unfit to be shipped.[193] And it is also said that if articles are included in a memorandum as perishable, they must be completely destroyed before the insured can recover as for a total loss.[194] So again, where a cargo of flour

[190] Cocking v. Frazer, reported in 1 Marshall on Insurance, ed. 1810, *227, *228. See Mason v. Skurry, reported in 1 Marshall on Insurance, ed. 1810, 225; Glennie v. London Assur. Co., 2 Maule & S. 371; Allen v. Smith, 2 C. C. S. 309; Ralli v. Janson, 6 El. & B. 422; 25 L. J. Q. B. 300; Booth v. Gair, 15 Com. B., N. S., 291; 33 L. J. C. P. 99; Navone v. Haddon, 9 Com. B. 30; 19 L. J. C. P., N. S., 161; Reimer v. Rengross, 6 Exch. 263; 20 L. J. Ex. 175; Thompson v. Royal Exch. Assur. Co., 16 East, 214; Wilson v. Royal Exch. Assur. Co., 2 Camp. 623; Great Indian Peninsular Ry. Co. v. Saunders, 2 Best & S. 266; 31 L. J. Q. B. 206; affirming 1 Best & S. 41; 30 L. J. Q. B. 218; Hedburg v. Pearson, 7 Taunt. 154; Holt N. P. 349.

[191] Merchants' S. S. Co. v. Commercial Mut. Ins. Co., 19 Jones & S. (51 N. Y. Super. Ct.) 444. See Providence-Wash. Ins. Co. v. Bowring, 1 C. C. A. U. S. 583; 1 U. S. App. 183.

[192] Neilson v. Colonial Ins. Co., 3 Caines (N. Y.), 168.

[193] Le Roy v. Governeur, 1 Johns. Cas. (N. Y.) 226; Buchanan v. Ocean Ins. Co., 6 Cow. (N. Y.) 318.

[194] Maggrath v. Church, 1 Caines (N. Y.), 196; 2 Am. Dec. 173. See Bryan v. New York Ins. Co., 25 Wend. (N. Y.) 617, per Nelson, J.; Depeyster v. Sun Mut. Ins. Co., 17 Barb. (N. Y.) 306; 75 Am. Dec. 331; 19 N. Y. 272; Ogden v. General Mut. Ins. Co., 2 Duer (N. Y.), 204; Harper v. New York Ins. Co., 22 N. Y. 444; Morean v. United States Ins. Co., 3 Wash. (C. C.) 250; Wadsworth v. Pacific Ins. Co.,

and corn was insured, it appeared that a part of the cargo had been thrown overboard for the preservation of the ship and lading, that the residue greatly deteriorated, was found to be unfit to reship, and was sold in the port into which the vessel had been driven for repairs. It was held that the insured was entitled to contribution for the corn thrown overboard, but that the insured was protected by the memorandum from any loss on what remained in specie though it had been reduced to half its value.[195] If a cargo is so damaged by peril insured against as not to be worth anything if sent to the port of destination, it may be abandoned although the policy contains a clause free from average,[196] and it is held that it is not sufficient that even ninety-five per cent be lost.[197] Again, where the cargo was corn, it was decided that the assured could not by abandonment elect to turn a partial into a total loss.[198] So it is declared in a Louisiana case that as to memorandum articles there is no constructive total loss, and that the goods must be specifically destroyed.[199] And in another case in the same state it is decided that to enable the assured to recover for a total loss there must be a total destruction of value, and the terms "free from average unless general" in a policy of insurance are convertible with total loss.[200] Again it is held that in a cargo of a mixed character no abandonment for mere deterioration in value during the voyage can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo including the memorandum

4 Wend. (N. Y.) 38; Burt v. Brewers' etc. Ins. Co., 9 Hun (N. Y.), 383; Merchants' Steamship Co. v. Commercial Mut. Ins. Co., 51 N. Y. Sup. Ct. 444; 19 Jones & S. 444.

[195] Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138.

[196] Parry v. Aberdeen, 9 Barn. & C. 411; 4 Moody & R. 343; Boyfield v. Brown, 2 Strange, 1065.

[197] Robinson v. Commonwealth Ins. Co., 3 Sum. (C. C.) 220.

[198] Morean v. United States Ins. Co., 1 Wheat. (U. S.) 219; affirming 3 Wash. (C. C.) 256.

[199] Skinner v. Western M. & F. Ins. Co., 19 La. 273, per Bullard, J.

[200] Aranzamendi v. Louisiana Ins. Co., 2 La. 432; 22 Am. Dec. 136. See Brooke v. Louisiana State Ins. Co., 16 Mart. (La.) 640.

articles, and if a technical total loss is sought to be maintained upon the mere ground of the deterioration of the cargo at an intermediate port to a moiety of its value, all deteriorations of memorandum articles must be excluded from the estimate.[201] So in case of an insurance on "cargo" composed principally of lemons and oranges, if the whole of the oranges are lost on the voyage by perils insured against, and the lemons are saved and arrive, the underwriter is not held liable for the loss of the oranges under the usual memorandum which warrants the underwriter free from particular average on fruit, etc.[202] In marine insurance the distinction is made that the rule as to actual total loss contemplates the arrival in specie of the goods or some part of them at their destination, or that they are capable of being forwarded there in specie.[203] There are also other cases in line with the above decisions.[204] The English case first above noted in the text in this section is considered as overruled in England, so far at least as it holds that for a loss during the course of the voyage there must be an absolute destruction or annihilation of the goods;[205] and a distinction evidently exists there between goods injured or lost by a peril insured against during the course of the voyage and the necessity for an abandonment to recover for a total loss when there is not an actual or inevitable destruction in specie,[206] and the case where the goods on arrival, even though greatly damaged or depreciated in value, are not wholly and actually destroyed or totally extinguished in value, but physi-

[201] Macardier v. Chesapeake Ins. Co., 8 Cranch (U. S.), 39.

[202] Humphreys v. Union Ins. Co., 3 Mason (C. C.), 429.

[203] Williams v. Kennebec Ins. Co., 31 Me. 455.

[204] Williams v. Kennebec Ins. Co., 31 Me. 455; Hugg v. Augusta Ins. Co., 7 How. (U. S.) 595; Willard v. Millers' etc. Ins. Co., 24 Mo. 561; Brays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415.

[205] Roux v. Salvador, 3 Bing. N. C. 266, 277, per Lord Abinger; Burnett v. Kensington, 7 Term Rep. 222, per Lord Kenyon; Cologan v. London Assur. Co., 5 Maule & S. 455, per Lord Ellenborough; Dyson v. Rowcroft, 3 Bos. & P. 475, per Lord Alvanley.

[206] Anderson v. Royal Ex. Assur. Co., 7 East, 58, reported in 2 Marshall on Insurance, ed. 1810, *594; Thompson v. Royal Ex. Assur. Co., 16 East, 214.

cally exist in specie, and are therefore not such an actual total loss as to bind assurers.[207] In other words, in certain cases of damage during the course of the voyage an abandonment may be necessary to recover for a total loss, while if the goods arrive in specie the underwriter is released and an inquiry as to the extent of the damage is precluded.[208]

§ 2939. Same Subject—Cases Favoring a Constructive Total Loss and Abandonment.—Notwithstanding the long line of decisions noted under the preceding section, there are other cases which hold a contrary rule and permit of abandonment under policies "free from partial loss," "free of average," and the like, even though the goods arrive in specie. Thus in a Pennsylvania case a vessel laden with perishable articles from Baltimore to Portland, Oregon, being injured off Cape Horn, put back to Rio Janeiro, where she was surveyed, condemned, and sold, as was the cargo, which had deteriorated, and could not be shipped in whole or in part to the port of destination, and it was held a case for abandonment as for a constructive total loss.[209] So in New York a policy on merchandise contained the clause "free of particular average only." The vessel was wrecked, and with the cargo was abandoned by the master in good faith, but the insurers refused to accept the abandonment, and afterward recovered from the wreck some of the cargo. It was decided that total physical loss of the goods is not necessary to warrant a recovery as for a total loss, and the right to abandon being exercised during the continuance of the peril, there being a total loss of value, that insurers were liable.[210] And in another case

[207] M'Andrews v. Vaughan, reported in 1 Marshall on Insurance, ed. 1810, *233. In this case the goods were damaged eighty per cent by delay occasioned by capture and recapture: Glennie v. London Assur. Co., 2 Maule & S. 371, 376.

[208] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *1028, *1038; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1009-16, noting at length the cases cited under the three preceding notes, as well as considering the rule in France and the opinions of Emerigon, Valin, Pothier, and Pardessus.

[209] Delaware Ins. Co. v. Winter, 38 Pa. St. 176.

[210] Wallerstein v. Columbia Ins. Co., 44 N. Y. 204; 4 Am. Rep. 664; reversing 3 Rob. (N. Y.) 528.

in the same state it was held that there could be a recovery for a total loss although a few articles were saved, but at an expense not justified by their value.[211] It is also held there that the articles under the memorandum clause are totally lost when by having been water-soaked in a storm they are rendered putrid, so that they cannot be carried to the port of destination without endangering the health of the crew, although they retain sufficient form and substance to be of some value.[212] So again in that state it is held that if a cargo is insured "free from particular average," and there is a destruction of all value to the owner, it is a total loss to him, even though only a constructive or technical one.[213] And where a chariot was insured "free from average," and the box, valued at two-thirds, was thrown over, the insured was held entitled to abandon the remainder of the chariot and recover as for a total loss.[214] In Connecticut the insertion of the common memorandum excepting the articles therein specified from particular average does not vary the rule by which when a loss on such articles happens from shipwreck or by damage to the vessel it is deemed a partial or total loss, and it is not necessary that the goods should be wholly and actually destroyed, so as no longer to exist in specie, nor that their value should be totally extinguished. If the voyage is so far arrested by a peril within the policy that the goods are not capable of being forwarded, and do not reach their destination nor come into the owner's hands, this is sufficient to subject the insurers to the loss. In this case the policy was on hides "free from partial loss," the vessel being wrecked in the course of the voyage; about one-third was saved by wreckers, but the part so saved was in such a state of putrefaction that they were sold for a small sum, and this was held a total loss.[215] In a federal case where about half the weight of insured machinery was saved in different

[211] Bryan v. New York Ins. Co., 25 Wend. (N. Y.) 617.

[212] Depeyster v. United States M. Ins. Co., 19 N. Y. 272; 75 Am. Dec. 331; reversing 17 Barb. (N. Y.) 306.

[213] Chadsey v. Guion, 97 N. Y. 333; 46 N. Y. Supr. Ct. (39 Hun) 118.

[214] Judah v. Randal, 2 Caines Cas. (N. Y.) 324.

[215] Poole v. Protection Ins. Co., 14 Conn. 47.

pieces, which were worth about one forty-fifth what the machinery would have been worth if in good order, but the pieces saved were unfit for use, and the cost of repairs would have exceeded the value, it was held that there was a total destruction in specie. In this case the exception was "free from average unless general," and the vessel was wrecked by a sea peril.[216] In Massachusetts it is held that if an article insured as free from average be placed in such a condition by the perils of the sea that, in consequence of inevitable deterioration or decay, it cannot reach the port of delivery, but will necessarily be destroyed before its arrival, and the same be sold at an intermediate port, this will constitute a total loss within the true intent of the policy.[217] In another case in the same state it is said that "by the American law if goods

[216] Insurance Co. v. Fogarty, 19 Wall. (U. S.) 640; citing Wallerstein v. Columbian Ins. Co., 44 N. Y. 204; Judah v. Randal, 2 Caines Cas. (N. Y.) 324.

[217] Tudor v. New England Ins. Co., 12 Cush. (Mass.) 554. See Murray v. Hatch, 6 Mass. 465. In another case in the same state, where the cargo, consisting of tin plates, was insured under a policy containing the usual memorandum clause and also the clause "partial loss on . . . . tin plates is excepted," the court said: "We can have no doubt that by the true construction of this clause the insurers were not to be liable for loss on tin plates unless such loss, estimated according to the rules and usages of Boston, should amount to a total loss," and it was added: "The natural construction of the exception" is, that it leaves the insurer liable for all total losses, but it makes no distinction between absolute and constructive total losses; and in case of a constructive total loss which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss as if absolute in its nature. The clause in question gives no intimation that it is any particular kind of total loss, whether absolute or technical. It simply excludes all kind of liability for a partial loss. By the natural construction of these provisions, it would seem that if the goods insured were placed by one of the perils insured against in that situation in which the assured has the right to abandon he has sustained a total loss not within the exception": Kettel v. Alliance Ins. Co., 10 Gray (Mass.), 144, per Shaw, C. J.; quoted with approval in Mayo v. India Mut. Ins. Co., 152 Mass. 172; 25 N. E. Rep. 80; 44 Balt. Underwriter, 254, per Allen, J., and in Pierce v. Columbian Ins. Co., 14 Allen (Mass.), 320, per Gray, J. In this case a distinction was also made between tin plates and memorandum articles liable to decay. The goods consisted of a number of boxes of tin plates, shipped and valued as one

other than memorandum articles are injured by perils of the sea to more than half their value, it is a constructive total loss, and authorizes an immediate abandonment and recovery." [218] In a case decided in 1890 in the same state,[219] where fertilizer constituted the ship's cargo under a policy stipulating "free from partial loss," it was attempted to treat the property as included in the common memorandum clause, and it was also argued that common memorandum articles were not subject to constructive total loss and abandonment, but the court refused to admit either proposition, and declared that said clause was "intended to apply to goods of a perishable nature and to meet the difficulty of proving whether a loss occurred from an inherent quality of the article or from a peril insured against." [220] The court notes another case of insurance against total loss only on vessel and outfits, as covering a constructive total loss,[221] and also another decision holding that

parcel, which were damaged by the stranding of the ship, carried to the nearest market and sold for less than half their valuation in the policy, deducting the necessary expenses of transportation and sale, and were abandoned and held a constructive total loss.

[218] Pierce v. Columbian Ins. Co., 14 Allen (Mass.), 320, per Gray, J.; Mayo v. India Mut. Ins. Co., 152 Mass. 172; 25 N. E. Rep. 80, per Allen, J.

[219] Mayo v. India Mut. Ins. Co., 152 Mass. 172; 25 N. E. Rep. 80; 44 Balt. Underwriter, 254.

[220] The court, however, refused to express an opinion on the point "whether in this commonwealth there can be a total loss of a memorandum article if any part of it arrives at the port of discharge in specie, or whether a special rule will apply to such articles, and there may be a constructive total loss and abandonment of them if . . . . the damage is such that the expense of landing and restoring the goods will equal or exceed their actual value, or whether the general rule in regard to other cargo will apply, and damage to the amount of one-half of the insured value will constitute a total loss." In this case, however, the cargo arrived at the port of discharge in specie, and it was agreed, also, that there had been a loss from the perils insured against of over fifty per cent of the value of the cargo, and it was held a constructive total loss justifying an abandonment, notwithstanding the exception "free from partial loss." The court noted several prior decisions, in one of which it was held that an insurance upon a ship against "total loss only" covered a constructive total loss: Heebner v. Eagle Ins. Co., 10 Gray (Mass.), 131.

[221] Greene v. Pacific Ins. Co., 9 Allen (Mass.), 217.

there was a constructive total loss of "advances" insured free from average by the constructive loss of a catch of a fishing vessel.[222]

§ **2941. Same Subject—Conclusion.**—There is much force in the reasoning of the Massachusetts courts, especially

[222] Burnham v. Boston M. Ins. Co., 139 Mass. 399; citing, also, Kettel v. Alliance Ins. Co., 10 Gray (Mass.), 141, as very much in point; Pierce v. Columbian Ins. Co., 14 Allen (Mass.), 320. But see Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303. *Opinions of Text-writers.*—Mr. Arnould distinguishes between "losses occurring in the course of the voyage" and where "sea-damaged goods arrive in specie at their port of destination," and says that "no degree of loss in bulk, deterioration in quality, or depreciation in value, will entitle the assured to put an end to the adventure, and recover a total loss without notice of abandonment, on goods warranted free of average, unless such damage involves their total destruction in specie, either actual or inevitable. If the commodity can be forwarded to its port of destination with any reasonable prospect of arriving there in specie, however damaged, the assured, who has failed to send it on, or sold it at an intermediate port, cannot recover as for a total loss, at all events without notice of abandonment," and that "there is no total loss if the goods, however damaged, arrive in specie": 2 Arnould on Marine Insurance, Perkins' ed. 1850, *1028, *1030; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1009, 1011. Mr. Phillips says: "The discrepancy of the . . . . decisions leaves us free to choose the doctrine of either set of them without the imputation of disregarding the authority of precedents"; but he favors the rule that "an insurance against total loss only or with the exception of particular average, the two forms being equivalent, excludes a constructive total loss on account of damage to the article, so long as it remains in specie and can be transported in the same ship, or another can be had to transport it to the port of destination so as to be there of value as being the sort of article which it was at the time of being shipped": 2 Phillips on Insurance, 3d ed., pp. 452-56, sec. 1767. And see secs. 1768, 1769, 1771, 1772. Mr. Parsons says: "We are, however, inclined to the opinion that the rule which would not sanction an action under a policy restricted to a total loss by any of the many phrases which are used for that purpose, unless the loss be total without abandonment, rests upon the weight of authority and on the stronger reason"; and again: "We consider the law to be that the effect of the words 'partial loss excepted,' or 'against total loss only,' is to exempt the underwriter from all loss but an actual total loss. But in Massachusetts the tendency of the late decisions seems to establish the rule that the assured may abandon if the article be not perishable in its nature": 2 Parsons on Marine Insurance, ed. 1868, 115-18, n. 117, 118, and see discussion 111-18, notes.

in view of the fact that, if the parties intend that the insurers shall be liable for absolute total losses only in cases of the above character, it is clearly in their power to so stipulate in express words. We are inclined strongly in favor of the rulings made in that state; nevertheless, in view of the conflicting authorities, we are unable to state any rule which can reconcile the clearly opposing views in this country.

§ **2942. Total Loss of Value.**—It is held that in an action upon a marine policy to recover as for an actual total loss the insured must establish the physical extinction of the property insured, or the extinction of its value arising from the perils insured against. Total loss of value to the owner is equivalent to total physical loss. But evidence falls short of establishing a total loss which does not prove that a portion of the property insured which reached the port of destination was of no mercantile value at the time of its arrival.[223] So it is also said that the property need not necessarily be annihilated, but it is sufficient if it is rendered of no use whatever by a peril insured against.[224] So in another case in New York it is also decided that the question is not one of the value of the goods, for if any portion arrive in specie at the port of destination, although possessing no value, there can be no re-

[223] Young v. Pacific Mut. Ins. Co., 2 Jones & S. (34 N. Y. Super. Ct.) 321.

[224] Cologan v. London Assur. Co., 5 Maule & S. 455, per Lord Ellenborough. See Cocking v. Frazer, per Lord Mansfield, reported in 1 Marshall on Insurance, ed. 1810, *227 (substantially overruled in England); Burnett v. Kensington, 7 Term Rep. 222, per Lord Kenyon. See Parry v. Aberdeen, 9 Barn. & C. 410. In a New York case, above noted, the court says: "There is no legal distinction, it is claimed, between the total loss of the thing and a total loss of the value of the thing, and that in the one case, as well as in the other, there is as to the insured an actual total loss within the fair meaning of the policy. We are not prepared to assent to this construction of the contract. We have not been referred to any authority which supports it. The general rule as to what constitutes the total loss of a ship is stated by Sewall, J., in the case of Murray v. Hatch, 6 Mass. 462. He says: 'If the ship is afloat, or if it is practicable to put her afloat, and if she is capable of being repaired at any expense, it is not a total loss within the meaning and intent of the policy.' The cases in this state in respect to memorandum articles

covery in case of memorandum articles.[225] So in case the policy provides against actual total loss, this, it is held, must be referred to the well-settled definition of an absolute total loss by a destruction of the thing in specie.[226] In an English case where sea damaged goods were compelled, by reason of decay and rottenness, to be thrown into the sea, they were held a total loss without notice of abandonment.[227] So that the English rule seems to be, that if the value of the goods is totally destroyed by reason of sea damage, there is a total loss. Whether this rule is simply applicable to goods at an intermediate port or may be extended to goods which have arrived in such condition is not clear, although the rule would probably govern both cases; but in case of goods warranted free from average the question depends upon total loss in specie, actual or inevitable, and is not one of depreciation in value.[228]

where the insurer is liable only for an actual total loss in the main sustain the view that total loss in value of memorandum articles, so long as they remain in specie, is not an actual total loss": Carr v. Security Ins. Co., 109 N. Y. 504; 17 N. E. Rep. 369, per Andrews, J. See Burt v. Brewers etc. Ins. Co., 78 N. Y. 400.

[225] Depeyster v. Sun Mut. Ins. Co., 19 N. Y. 272, per Grover, J. See Globe Ins. Co. v. Sherlock, 23 Ohio St. 50; Murray v. Hatch, 6 Mass. 465. Examine Hugg v. Augusta Ins. etc. Co., 7 How. (U. S.) 595; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Macardier v. Chesapeake Ins. Co., 8 Cranch (U. S.), 39; 3 Kent's Comm., 5th ed., 295,

[226] Burt v. Brewers' etc. Ins. Co., 78 N. Y. 400.

[227] Dyson v. Rowcroft, 8 Bos. & P. 474.

[228] See Saunders v. Baring, 34 L. T., N. S., 419; Anderson v. Royal Ex. Assur. Co., 7 East, 58; Roux v. Salvador, 3 Bing. N. C. 266; Cologan v. London Assur. Co., 5 Maule & S. 477, per Lord Ellenborough; and consideration of these cases in 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1023, et seq., *1020, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1005, et seq. Mr. Phillips thinks the better opinion is, that in insurance against total loss only, or with the exception of particular average, it is necessary that the article should be of "value" at the port of destination, even though it exist in specie. But he also says that the cases present such a conflict that it is a matter of discretion with the judges as to which rule shall be adopted: 2 Phillips on Insurance, 3d ed., 452. This author, however, places an insurance with the exception of particular average on the same ground as one against total loss only. Under the California code, any damage to the thing which renders it valueless to the owner for the purposes intended and for which it is

§ **2943. Shall not Abandon until "Ascertained that the Recovery and Repairs of Said Vessel are Impracticable."**—If the policy provides that the vessel shall not be abandoned until it is ascertained that its recovery and repair is impracticable, this said clause will be construed to have reference to the time the abandonment was made, so that where a vessel was carried over the falls of a river and sunk, and it was impracticable to recover and repair her at the place where she then lay, having in view the uncertainty as to when, if at all, a rise would come and float her off, and all the other circumstances of the case existing at the time of making the abandonment, then the fact that the vessel was recovered and repaired a year after does not invalidate the abandonment, and the court refused to instruct the jury that the fact that the vessel was recovered and repaired was the "best evidence" that it was practicable to recover and repair; it was held proper.[229]

§ **2944. Peril Removed Before Loss Takes Place.**—If the peril insured against be removed before any loss takes place, and the voyage is not broken up thereby, but is or may be resumed, the insured cannot abandon, even though said peril does act upon the subject insured or is imminent.[230]

§ **2945. Ultimate State of Facts when Action brought Controls in England as to Abandonment.**—The rule in

held causes an actual total loss. Although in case of insurance upon a thing, or particular class of things, it is not sufficient that the subject become entirely worthless, for the insured is not liable for any particular average loss not depriving assured of possession at the port of destination of the whole of such thing, or class of things, but assurer is liable for his proportion of all general average losses assessed upon the insured property: Deering's Annot. Civ. Code Cal., secs. 2704, subd. 3, 2711.

[229] Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; 8 Supr. Ct. Rep. 68; citing Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 378, 379; Rhinelander v. Insurance Co., 4 Cranch (U. S.), 29; Marshall v. Delaware Ins. Co., 4 Cranch (U. S.), 202; 3 Kent's Commentaries, 321.

[230] Smith v. Universal Ins. Co., 6 Wheat. (U. S.) 176; Parsons v. Scott, 2 Taunt. 363; Hall v. Franklin Ins. Co., 9 Pick. (Mass.) 466; Bambridge v. Nielson, 10 East, 329.

England seems to be settled that the ultimate state of facts appearing at the time the action is brought is the criterion of the right to recover for a total loss, "and if at that time what had antecedently been a total loss has by subsequent events ceased to be so, and become an average loss merely, a compensation for an average loss can alone be recovered,"[231] although the validity of the abandonment there depends upon the state of things existing when notice is given of abandonment.[232]

§ **2946. State of Facts Existing at Time of Abandonment Controls Here.**—By the law of this country the right to recover for a constructive total loss depends upon the state of facts existing at the time of the abandonment. The right to abandon is a vested right, and once rightfully exercised it cannot be devested by subsequent events, unless by the express or implied consent or waiver of assured. In brief, if the right is properly exercised, and the abandonment is good when made, facts thereafter arising cannot alter its character.[233] Thus, it is said, "if such a state of things existed at the time of the abandonment as justified it, then the company is liable,

[231] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *994; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 972, 1029, et seq.; citing Bambridge v. Neilson, 10 East, 329; Smith v. Robertson, 2 Dow. Parl. C. 474, per Lord Eldon; M'Iver v. Henderson, 4 Maule & S. 584, per Lord Ellenborough; Brotherston v. Barber, 5 Maule & S. 418; Hamilton v. Mendes, 2 Burr. 1198, 1210; Naylor v. Taylor, 9 Barn. & C. 718.

[232] 2 Arnould on Marine Insurance, Perkins' ed. 1850, *993.

[233] Wallace v. Thames etc. Ins. Co., 22 Fed. Rep. 66; Schieffelin v. New York Ins. Co., 9 Johns. (N. Y.) 21, 26, per Kent, C. J.; Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 378; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; 8 Supr. Ct. Rep. 68; Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348; Coolidge v. Gloucester Ins. Co., 15 Mass. 341; Mansfield v. Delaware Ins. Co., 4 Cranch (U. S.), 202; Snow v. Union Mut. etc. Ins. Co., 119 Mass. 592; Wood v. Lincoln Ins. Co., 6 Mass. 479; 4 Am. Dec. 163; Church v. Bedient, 1 Caines (N. Y.), 21; Dickey v. American Ins. Co., 3 Wend. (N. Y.) 368; 20 Am. Dec. 763; Teasdale v. Charleston Ins. Co., 2 Brev. (S. C.) 190; Marks v. Nashville Ins. Co., 6 La. Ann. 127; Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412; 5 Am. Dec. 283; Rhinelander v. Insurance Co., 4 Cranch (U. S.), 29.

regardless of subsequent events or developments occurring after notice of the abandonment to the insurer or his agent." [234] So the condition of the vessel at the time of the abandonment is undoubtedly the test of the right to abandon,[235] and the loss should be deemed effectual and certain from the time the vessel was so injured that her destruction became inevitable, and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after injury.[236] But if a technical total loss occurs, and the vessel is fully repaired by the master or other agent of assured, and is on her voyage before actual abandonment, the abandonment is of no effect, and the assured can recover only for a partial loss.[237] It is held sufficient, however, if the loss continues total to the time when the abandonment is made.[238] The general rule also applies where there is a credit stipulated to the insurer, and the loss ceases to be total before the expiration.[239] An intermediate abandonment was held valid where a ship was seized and carried into port, and eventually the ship and cargo were restored, and the court ordered full freight to be paid, but the master refused to reship the cargo, and there was no other opportunity for reshipment for thirty-six days.[240] So neither an acquittal nor a restitution affect an abandonment of a vessel or freight once fairly made.[241] Again, where a vessel was captured and condemned, and an offer to abandon made, which was refused, it was not in the power of the master by any act of his, as by way of compromise with the captors af-

[234] Hundhausen v. United States F. & M. Ins. Co. (Tenn. 1875), 17 S. W. Rep. 152.

[235] Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658; Dickey v. New York Ins. Co., 4 Cow. (N. Y.) 222; Saurez v. Sun Mut. Ins. Co., 2 Sand. (N. Y.) 482.

[236] Duncan v. Great Western Ins. Co., 1 Abb. App. Dec. (N. Y.) 562; 3 Keyes (N. Y.), 394.

[237] Dickey v. New York Ins. Co., 4 Cow. (N. Y.) 222; affirmed, Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658.

[238] Earl v. Shaw, 1 Johns. Ch. (N. Y.) 313.

[239] Munson v. New England Ins. Co., 4 Mass. 88.

[240] Dorr v. New England Ins. Co., 4 Mass. 221.

[241] Bordes v. Hallett, 1 Caines (N. Y.), 444.

ter condemnation and recovering back the vessel, to change a total into a partial loss without the subsequent assent of the assured, and in such case the purchase of the vessel by the master is for the insurer's benefit, if he chooses to avail himself thereof, but if he does not, the refusal does not affect the abandonment.[242] So the redelivery of a captured vessel on bail does not defeat the right to abandon,[243] and where by an arrangement with the supercargo of a vessel, captured on her outward voyage, ratified by the prize court of the country two-thirds of the cargo were allowed to the captors and one-third restored, it was held that neither this partial restoration nor the reception by the assured of the proceeds of it invested in a return cargo took away the right to abandon, nor waived or invalidated a prior abandonment.[244] But the right of the assured to abandon for a total loss depends upon the state of the facts at the time of the offer to abandon, and not upon the state of the information received.[245] In freight, as well as on ship and cargo, a right to recover a total loss of freight will not be defeated by subsequent events; as where a ship stranded and sold was subsequently gotten off, this did not prevent its being a total loss of freight.[246]

§ 2947. **Total cannot be Changed into a Partial Loss by Acts of Insurer or Agent after Justifiable Abandonment.**—In case the circumstances are such as to justify an abandonment under the policy, the rights of the parties

[242] Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412; 5 Am. Dec. 283. See Robinson v. United Ins. Co., 1 Johns. (N. Y.) 592; Livingston v. Hastie, 3 Johns. Cas. (N. Y.) 293.

[243] Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348. Examine Livermore v. Newburyport Ins. Co., 1 Mass. 264, 282.

[244] Radcliff v. Coster, 1 Hoff. Ch. (N. Y.) 98.

[245] Marshall v. Delaware Ins. Co., 4 Cranch (U. S.), 202; 2 Wash. (C. C.) 54; Olivero v. Union Ins. Co., 3 Wheat. (U. S.) 183; Dorr v. Union Ins. Co., 8 Mass. 502; Robinson v. Jones, 8 Mass. 536; Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450; Child v. Sun Mut. Ins. Co., 2 Sand. (N. Y.) 76; Dickey v. New York Ins. Co., 4 Cow. (N. Y.) 222; affirmed, 3 Wend. (N. Y.) 658.

[246] Mount v. Harrison, 4 Bing. 388; 1 Moore & P. 14.

have become fixed, and insurers cannot change a total into partial loss by their subsequent acts.[247]

§ 2948. Recovery or Restoration of Property or Indemnity Received before Abandonment.—If the assured before abandonment recovers back the thing insured, or if he recovers an indemnity for the loss, he cannot abandon. Thus, where the assured obtained payment from the United States government for the loss of a vessel which the government officers had seized for service, it was held that there was no such loss as would entitle the assured after said payment to abandon and claim a total loss.[248] Under the California code, if the vessel is so far restored when the abandonment is made that there is then in fact no total loss, the abandonment is of no avail.[249] We have already noted the distinction between the law of England and this country as to the time to which the abandonment relates,[249a] and necessarily this distinction affects the fact as to the restoration of the property, for if it is restored, after notice of abandonment and before action brought, in such a condition as to warrant insisting upon assured's taking possession, assured's right to insist upon abandonment is taken away under the English rule, even though assured was justified in making the abandonment at the time when made. But if the ship when restored might then be abandoned, a recovery may be had.[250] The principle under-

[247] Wallerstein v. Columbian Ins. Co., 44 N. Y. 204; reversing 3 Rob. (N. Y.) 528. See Carr v. Providence-Washington Ins. Co., 38 Hun (N. Y.), 86; 12 Cent. Rep. 650; affirmed, 109 N. Y. 504, per Andrews, J.

[248] Murray v. Harmony Ins. Co., 58 Barb. (N. Y.) 9.

[249] Deering's Annot. Civ. Code Cal., sec. 2720.

[249a] See secs. 2945, 2946, herein.

[250] Bainbridge v. Neilson, 10 East, 329; Hamilton v. Mendes, 2 Burr. 1198; Brotherton v. Barber, 5 Maule & S. 418; Holdsworth v. Wise, 7 Barn. & C. 794; Naylor v. Taylor, 9 Barn. & C. 725; Patterson v. Ritchie, 4 Maule & S. 393, all cited with other cases in 2 Arnould on Marine Insurance, Perkins' ed. 1850, *994, et seq., 1064, *1060, 1067, *1063, et seq.; 2 Arnould on Marine Insurance, Maclachlan's ed., 1887, 1028, 1031, 1033.

lying this rule is applicable to a restoration before abandonment made in this country,[251] although, as elsewhere stated herein, an abandonment justified when made, and being otherwise valid, cannot be affected by subsequent events except perhaps in cases of waiver.[252]

[251] See sec. 2969, herein, as to right to abandon being revived.
[252] See sec. 2972, herein.

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